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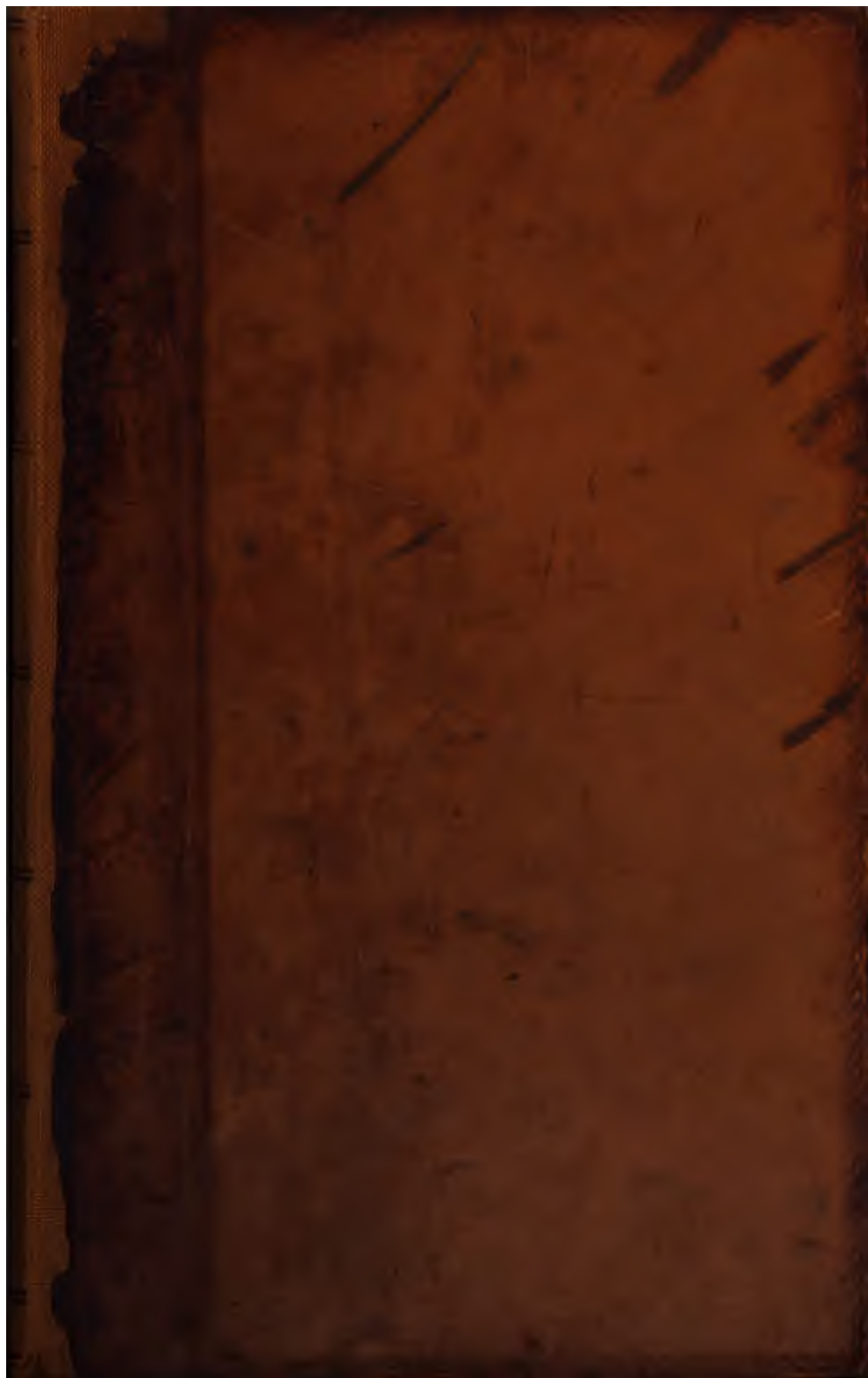
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A
DICTIONARY OF THE PRACTICE
IN
CIVIL ACTIONS,
IN THE COURTS OF
King's Bench and Common Pleas,
WITH
PRACTICAL DIRECTIONS AND FORMS,
ARRANGED UNDER EACH TITLE.

By THOMAS LEE,
OF GRAY'S INN, BARRISTER AT LAW.

VOL. I.

THE SECOND EDITION,

**CORRECTED, ENLARGED, THE ANCIENT WORDS AND
PHRASES TRANSLATED AND EXPLAINED;**

WITH A
BRIEF SUMMARY PREFIXED,

OF THE
CIVIL ACTION, OR PROCESS AT LAW, AND ITS INCIDENTS, IN K. B. AND C. P.



*Sunt jura, sunt formulæ de omnibus rebus constitutæ, ne quis aut in
genere injuriæ, aut ratione actionis, errare possit. Expressæ sunt enim
ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, pub-
licæ a prætore formulæ, ad quas privata lis accommodatur.*

CIC. PRO ROSC. COM.

LONDON:
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1825.

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EXTRACTS FROM PREFACE

TO

THE FIRST EDITION,

CORRECTED.

THE merit of a compilation on *Practice* may be estimated not only by the accuracy of the practical information, and the fidelity with which the authorities are cited in its support, but by the order or mode of arrangement adopted; and, with a view to the latter ground of estimation, the compilation now offered to the profession has been edited.

THE title "Dictionary" sufficiently indicates the arrangement to be alphabetical. In that order will, I hope, be readily found *the point of Practice*, collected from the reports of cases in each court: *the Office-proceeding*; and the *Form* such proceeding may require. Where the proceeding in the two Courts is different, the practice in each is distinguished and separately set down. A detail of the arrangement is as follows:

First, occurs the title of Practice; as, for instance, **AFFIDAVIT OF DEBT**; under this head or title its nature and origin are explained; decisions in point are collected, particularly the more modern: all

the authorities, nearly without an exception, I have perused, and they are fully cited.

Secondly. Following this first division, and in italic type, appear *Practical Directions* appropriated to the previous particular head or title so alphabetically occurring. These Practical Directions are distinguished where the different practice, of the two courts seemed to warrant such distinction, by the letters K. B. and C. P. In this division is comprised the office direction, fees, &c. and whatever else it may be expected the clerk should know. This part of the work is little interrupted with any reference to cases or decisions; but in plain language, suited to the occasion, the mode of transacting the office business is pointed out.

Thirdly. In a type differing from that of the foregoing divisions, immediately following the Practical Directions in each Court, are subjoined the *Forms*.

FROM amongst the great variety of forms, I have endeavoured to select those which have been long known and approved; they are most important in practice, and to them particularly, as to pleading generally, may well be applied the maxim *via trita, via tuta*.

A RUNNING head or title at the top of the page will still further facilitate reference.

AN index of the titles, together with the pages wherein they respectively occur, is prefixed: where a reference from these titles to others in the body of the work occurs, such reference is also noted.

MY object was to compile a book of ready and immediate reference for office use ; a book that should be at once comprehensive, faithful, and adequate ; and I may avow, that neither zeal, labour, nor attention, have been wanting to attain that object. A system of practice regularly and technically unfolded may be of great utility ; but every step of practice may be considered insulated and independent of a previous one, and therefore, of all other plans, that of alphabetical arrangement of each step, seems the best calculated for actual business.

THAT I may have been indebted to the labours of former compilers, is as necessary as that they should have been indebted to those of their predecessors ; a collector of cases and of rules of practice is not free to *select*, he can only *state* practice ; and the merit is with him who states it perspicuously. I respect the labours of other men. When guided amidst doubt and intricacy, it would be ungracious to censure imperfection where perfection was impossible ; but it is one thing to travel by a rugged or obscure path, another to render that path obvious and smooth. Before Mr. Impey's meritorious labours, the attorney must have had to rely upon information delivered on tradition only ; and such information, sometimes, diversely given, even by officers of the courts : the books of that gentleman first embodied much of the general practice. Richardson had improved upon the older compilers. Crompton digested, and somewhat methodically arranged the authorities. Mr. Serjeant Sellon usefully re-edited Crompton ; and the accurate contributions of Mr. Tidd, by uniting the masterly perspicuity of the commentaries with the utmost fidelity of research, seemed to consummate the perfection of a practical work. Esteemed by the present

age, Mr. Tidd's volumes will, with the commentaries, be identified with their subject so long as the laws of England shall be deemed an object of practical or of erudite investigation.

STILL it was felt that something was wanting to facilitate the means of certain, appropriate, and immediate reference. To say that I have taken nothing for granted, seems self praise; but I am unaware that it is wrong to avow the performance of a great duty where it is of importance that others should believe that duty to have been scrupulously performed.

PREFACE

TO

THE PRESENT EDITION.

THAT numerous additions, whether of New Titles, Cases, or Practical Directions, have been made to the present Edition, will, on very slight comparison with the First, be apparent. Many Forms have been added, and the others carefully revised; and, whether usefully or not, the ancient words and phrases have, for the most part, been translated and explained.

I HAVE not sought to incumber a mere office book with matter, not at once generally practical: yet I have prefixed a Summary of the civil action or process at law in K. B. and C. P; brief, indeed, but not the less calculated, as I think, to enable those who would acquire a more connected view of practice, to attain that object through the medium of this book; but I cannot desire that more studied or detailed reading should be neglected.

SOME of the notes might have been spared, and I almost wish they had; but no man can minutely look over practice, and not see that something useful might be added, much that is useless be retrenched, and the whole rendered more uniform in its parts; for it cannot be otherwise than most desirable, that the forms of the administration of justice should be defined, intelligible, and consistent.

MANY points connected with process, bail, and declaration, although frivolous in themselves, are vexatious to the suitor, and unprofitable, and even harassing, to the fair and liberal practitioner. The points affecting these titles might be collected, and, under the dictates of authority, an arrangement might be made, whereby the several steps relative to each point might be governed.

It was but reasonable to expect, that, from practical decisions having become so numerous, certainty would thence have resulted; but the contrary is the fact: and although even a code of practice might not, perhaps, be perfect, at first, yet no man can say, that a digest of that description would not work an approximation to further excellence.

IN 1654, something of this was done. Comprehensive rules and orders were made, and the practice of that time became much ameliorated; but since then only little has been attempted, and still less, comparatively, done by authority, acting purposedly and from itself. The little which has been done arose out of the passing or insulated occasion, perhaps the dictate of the expediency of the moment; and hence the want of consistency, in relation to the points of practice, as a whole.

I AM well aware, that even to touch an ancient fabric is sometimes to shake and ultimately to destroy it. Innovation has its evils, but what is ancient is not on that account always good; and what is good and what is bad of practice, may happily be approached without vital danger to any political establishment, and without disrespect to venerable authority.

LASTLY, I may observe, that although what is here written might indicate querulousness, and even a conviction that much of practice is objectionable, yet it becomes me to say, that upon the whole, practice, as it now stands, is greatly calculated to advance the rights, and redress the wrongs, and altogether to further the best interests of the suitor. It is only on insulated points, not, indeed, numerous, although important in themselves, that it appears to me to be otherwise.

INNER TEMPLE,
21st Feb. 1825.

☞ *The statute, repealing the Stamp Duties upon Law Proceedings, was not passed until some time after this Edition went to press.*

The Tables of Officers and Offices prefixed to the First Edition is omitted in the present; the Law Almanack containing all the necessary information as to them.

A

BRIEF SUMMARY

OF THE

CIVIL ACTION, OR PROCESS AT LAW,

AND ITS

INCIDENTS IN K. B. AND C. P.

AN action is a legal demand of one's right. *Co. Lit.* 285. 2 *Inst.* 40. The mode by which a party seeks redress in the superior courts of common law, for any right violated or withheld, and that mode by which he, against whom such redress is sought, endeavours to defend himself in such courts, is properly called practice. And it is this practice, which originates the multifarious titles found in the following Work.

But as each title is in itself for the most part insulated, and dependent more or less upon some act done, or supposed to be done in court, before or after the act treated under such title, I have deemed it useful to prefix this Summary, calculated, as I think, to offer a connected view of practice as a whole, while the Dictionary itself is so framed as to offer a view of practice in its parts and details.

Practice, then, properly, is the prosecution and defence of actions or suits in court. It may be unnecessary to do more here, than specify the titles by which the several actions are known in practice.

Some of these are brought indifferently in either of the superior courts; others are proper to one of them only.

Those which are brought indifferently in either court, are,

1. The action of trespass, or trespass generally.
2. The action of trespass on the case, or trespass founded upon a particular statement of the nature of, and means by which an injury has been committed, or right withheld.
3. The action of debt. Debt on statute. On judgment.
4. The action of detainue.
5. The action of covenant.
6. The real action, or action for the recovery of right in lands, or real property.
7. The action of ejectment.

Further, to distinguish these actions here, seems unnecessary. One mode of commencement of suit against persons not privileged, is common to all, except the last, namely, by writ; where persons are privileged, the commencement of process is in one case by writ, and in all others by bill. The commencement of the last-mentioned action, namely, ejectment, is by declaration. Where the first step in practice is a writ, operating as a summons to the party to appear in court, I shall specify the different descriptions of writ usually adopted as process :

1. The Original Writ, with the *capias* founded thereon.
2. *Latitat*.
3. Bill of Middlesex. This, although in form and substance a writ, is yet but a precept.
4. *Capias ad respondendum*.
5. *Quare clausum fregit*.

The original writ is sued out of Chancery. The *capias* thereon is common to K. B. and C. P.

The *latitat* and bill of Middlesex are proper to K. B.

The *capias ad respondendum* and *quare clausum fregit* are proper to C. P.

Process is commenced against privileged persons, namely, against a peer by original writ, and against other privileged persons, some by bill, as attornies; and some by writ or bill, as members of parliament.

And, lastly, the process in ejectment is commenced by declaration.

All these different processes are treated in this Dictionary, under the titles before enumerated.

The action of replevin and *quare impedit*, I merely mention here for the purpose of suggesting a reference to the titles.

Process having been issued, or bill being filed at the instance of the complaining party or plaintiff, as he is called, against the party whose appearance is sought, who is called the defendant, he thereupon either finds bail, actual and personal, called special bail, or he appears by attorney by fictitious bail, called common bail; or he is altogether silent, and without any more steps taken on his part allows the suit to go on towards its legal termination. Why he finds special bail, or simply appears, or files common bail, results from the nature of the process; that is to say, whether it have attached his person, or whether it shall have been merely a summons to appear conformably with the notice to appear usually subjoined to writ or process not demanding special bail.

Presuming special bail to have been perfected, or appearance duly entered, the next step in order taken, is to prepare and file, or deliver the declaration. This states the grounds upon which the defendant is called upon to answer the plaintiff.

The declaration is matter for grave consideration; at all times requiring great attention, both as to form and substance.

The defendant having been properly required so to do, answers the declaration within a stated period; that is to say, answers, or pleads, as his answer is termed, within a period settled by rules of practice.

The answer may be a demurrer upon the law of the case appearing upon the face of the declaration; or it may be a plea denying the jurisdiction of the court; or it may be personal, as misnomer; or it is a denial of guilt, or of the fact of imputed wrong; or of the liability charged in the declaration.

Upon the demurrer or plea, the plaintiff joins issue; that is to say, his answer is so framed as that the question is either to be determined by the court at Westminster, or by a judge before a jury at *nisi prius*.

If the determination be referred to the court, a day for argument of the legal question appearing on the paper book, K. B. or roll or demurrer book, C. P. is appointed; on which day the points in question or difference are argued in open court by counsel or serjeant on each side, and judgment is thereupon given for or against the remedy sought.

If the plea be as to matter of fact, and not of law, the question between the parties is referred to be tried by a judge and jury at *mihi prius*; that is to say, before a court sitting to try the merits of the case.

The result of a trial is either nonsuit, a special verdict, or a special case, or a verdict generally, for the plaintiff or defendant.

Of this verdict, whatever it may be, an accurate record is made, called a *postea*.

This *postea*, in due time, becomes the ground or basis of a final judgment:

And it is upon this judgment that execution issues.

I have thus endeavoured to convey a notion of the successive steps or stages of practice ordinarily occurring in the progress of a suit, from its institution or first process to its termination by judgment and execution; and those who may be desirous of consulting this Dictionary for that end, may refer to the titles mentioned in the order in which they here respectively occur. As first,

<i>King's Bench, Court of.</i>	<i>Bail, common.</i>
<i>Common Pleas, Court of.</i>	<i>Bail, above.</i>
<i>Process.</i>	<i>Declaration.</i>
<i>Original Writ.</i>	<i>Demurrer.</i>
<i>Latitat.</i>	<i>Plea, Pleading.</i>
<i>Bill of Middlesex.</i>	<i>Issue.</i>
<i>Bill.</i>	<i>Trial.</i>
<i>Capias ad Respondendum.</i>	<i>Nonsuit.</i>
<i>Recordari Facias Loquelam.</i>	<i>Verdict.</i>
<i>Pone.</i>	<i>Postea.</i>
<i>Quare Clausum Fregit.</i>	<i>Judgment.</i>
<i>Appearance.</i>	<i>Execution.</i>
<i>Member of Parliament.</i>	<i>Capias ad Satisfaciendum.</i>
<i>Attorney.</i>	<i>Fieri Facias.</i>
<i>Peer.</i>	

What is above said, supposes the progress of the suit from process to execution, to have been uniform and uninterrupted.

But it very seldom happens that the current of the suit is uninterrupted. And hence it is, that numerous titles will be found to occur, all of them having reference to the suit, and thereby becoming incidental to its progress and termination.

I shall endeavour to collect in this place the *membra disjecta*, the titles scattered alphabetically throughout the Dictionary. By consulting these in the order in which they will be presently mentioned, a connected or continuous view of the suit or action, and its incidents, will be obtained. If this shall be done with perspicuity, all the purpose of this Summary will be accomplished.

It has been seen upon what process every action, and its ordinary termination by execution usually is founded; and it has also been seen in what way, generally, defence is made by special bail, by common bail, by appearance, and demurrer or plea.

I shall now trace the acts or steps which may become incidental to the original writ.

Upon this writ there issues out of the proper court a *capias*, under which the defendant is taken, or with a copy of which he is served. If by the defendant's absence, or otherwise, the writ, be rendered abortive, that is to say, if the defendant can neither be taken or served, there issues an *alias capias*; and if necessary, a *pluries*. To one or all of these writs, the sheriff, or other similar officer to whom they are directed, may return either that he has taken the defendant, or that not being found in his bailiwick or liberty, such sheriff or officer could not take him. If he return upon all the writs, that the defendant is not found, the plaintiff proceeds to outlawry of the defendant, and then follow other acts incidental to process, namely, proclamation or *exigent*, and thereby the consummation of the outlawry, *capias utlagatum*.

But in order that the sheriff or other officer having execution and return of process, may be enforced to fulfil their duty, the courts have provided means, not only of calling upon them to return the

writ, which shall have been issued, directed to them, but of punishing them in case they make no return, or in case of the return, when made, being false. In case of no return, the sheriff or officer is liable to be attached; and in case of a false one, he is liable to an action on the case.

Upon the sheriff's ability, from the fact being so, to return that he has taken the defendant, the sheriff is next called upon to bring in the body that is to say, he is to shew by his return, not only that he has the body of the defendant ready, but that he is lodged in the sheriff's safe custody.

As to these incidents of practice, therefore, see the following titles, in the order in which they are here placed, viz.

<i>Original, Proceedings by</i>	<i>Attachment against Sheriff.</i>
<i>Original.</i>	<i>Proclamation.</i>
<i>Capias.</i>	<i>Outlawry.</i>
<i>Alias capias.</i>	<i>Exigent.</i>
<i>Pluries capias.</i>	<i>Exigi Facias.</i>
<i>Non est inventus.</i>	<i>Capias utlagatum.</i>

These are so many incidents to the prosecution and termination of a suit happening to all and each of the heads or titles above specified.

Points growing out of such incidents may arise :

1st, As to the mode of issuing process; and this includes the office forms.

2d, To the mode of execution. The issuing of the process upon which a party is to be arrested or held to bail, may be wrongly founded, for instance, upon an imperfect affidavit.

Or, if serviceable upon an erroneous copy; or upon a defective service.

3d. The declaration or formal statement of the complaint of right withheld, or wrong done, may be bad in its form; or in its substance; or as to the time when it was delivered or filed.

If good in form and substance, the defendant pleads or answers, as in the ordinary course of the suit, so as to enable his adversary to go to trial.

If bad in form or in substance the defendant files or delivers a statement of the grounds upon which the objections are founded; such statement is called a demurrer; or *mora in legem*.

It will thus be perceived, that, as incident to declaration, demurrer may occur.

It will thus have been seen, that the ordinary prosecution of a suit at law is divisible into eleven general heads, viz.

- | | |
|--|---|
| 1. Process; bailable or serviceable. | 6. Trial. |
| 2. Appearance; by special bail or common bail. | 7. Verdict. |
| 3. Declaration. | 8. Nonsuit. |
| 4. Plea. | 9. Postea, or judge's return of such verdict. |
| 5. Issue. | 10. Final judgment. |
| | 11. Execution. |

But upon the steps taken with reference to every one of these heads, some may be proper, some improper; it may happen, that something ought to have been done which shall have been omitted, or something shall have been omitted which ought to have been done.

The ordinary step taken in the cause after declaration is, as we have seen, a plea; a demurrer being out of course, is merely casual to the declaration.

If the demurrer be well founded, that is to say, if the objection taken to the declaration, whether of form or of substance be tenable, or supposed to be tenable, means are taken to obtain the judgment of the court thereon. If really tenable the plaintiff is not willing that further expense be incurred in procuring the judgment of the court, and therefore he generally obtains a judge's order for the amendment of his declaration; but as some objection may lie to the granting of such order, it is not granted until the defendant shall have had an opportunity afforded him for stating such objection, and for denying the plaintiff's right to amend.

What usually therefore precedes an order for amendment of a declaration or plea, is a summons signed by a judge, whereby the defendant is called upon to attend the judge at a time and place specified, to shew cause why the declaration should not be amended.

The summons and order therefore become incidental to the declaration.

If this order be made, which it usually is, upon payment of costs, the plaintiff either alters the defendant's copy, or if the errors be very numerous or extensive, the plaintiff delivers a copy of the declaration engrossed anew, and the defendant either pleads or demurs again as he may be advised.

But if the demurrer shall in itself have been bad or groundless; that is to say, if it manifestly be for the sake of delay, the plaintiff hastens to procure the judgment of the court, and he moves for a *concilium*; that is to say, he moves, by his counsel, for a day to be appointed for argument and judgment upon the demurrer.

Upon such day the demurrer is argued, and judgments given upon the law of the question raised, whether for the plaintiff or for the defendant.

It hence appears, that these are incidents to the declaration.

See, therefore, in the order following these several titles, viz. *Declaration. Demurrer. Concilium. Order. Summons. Paper-book.*

But, upon the presumption that the declaration be unattended with the incidents above-mentioned, or that by the means stated they shall have been obviated, the next step taken in the course of the suit is the plea.

See the title *Plea, Pleading.*

Although a replication is, in the ordinary course, the next step taken with reference to a plea, yet, like the declaration, it is open to demurrer. And should such demurrer be filed, the pro-

ceeding either to amend or to obtain argument and judgment thereon, is the same as where the demurrer had occurred with reference to the declaration.

Demurrer then, becomes an incident to a plea, and indeed, to any successive form of pleading, whether coming from the plaintiff or from the defendant.

Having thus enumerated the principal incidents sometimes only occurring to declaration and also to plea, and the successive pleadings, I shall note those occurring to the issue; the next principal step in or towards the trial of the cause. See title *Issue*.

It sometimes happens, and usually through inadvertence, that the issue, which, it will have been seen, should contain the whole pleadings, whether the issue be one triable at law, at bar, before the judges of the court, or one triable, as matter of fact, before a single judge and jury, at *nisi prius*, varies either from the declaration or from the plea or pleas thereto, or from the subsequent matters or forms which shall have taken place with reference to the declaration or original form of complaint; and hence such variance becomes also an incident in the prosecution of the suit. See title *Variance, variance of issue from declaration, &c.*

The next principal title is that of trial, and on or relating to this the incidents are numerous. For instance, it may happen, that although in all other respects both parties may be ready and willing to go on to trial; yet a witness whose attendance was anticipated, may not be forthcoming, and hence the necessity for an application to put off the trial on account of such absence. See title *Trial*, sect. V.

Or it may have happened that upon the trial the judge shall have deemed certain testimony or evidence then adduced proper or improper to be received, and which reception or rejection upon his part shall have finally influenced the determination of the cause; in such case, the counsel on either side is at liberty to except to what the judge shall have decided; and this is done by presenting to him for his seal and signature an instrument, called a bill, containing such exceptions. See title *Bill of Exceptions*.

But the judge may also rule that either in point of law, or from defective evidence, the plaintiff may not go on with the cause, and thus it is that nonsuit also becomes very frequently an incident to trial. See title *Nonsuit*.

Or it may happen, that by reason of matters of fact being so commingled with maxims or rules of law, the verdict to be then given by the jury upon the whole question, might not be final, or only lead to further litigation; in such case the judge often proposes to the parties, that the jury shall merely find the facts which are subsequently to be stated in the form of a special case for the opinion of the court. Or, what is very analogous with a special case, the jury are sometimes recommended to find a special verdict. See title *Special Verdict*. In both cases, no final judgment is pronounced until after the questions to be thus raised shall have been argued at bar.

But, exclusively of these incidents to trial, others may be mentioned having reference to the jury. See titles *Jury*, *Special Jury*. So, as to witness; several matters become incidental to their person, to their character, to their competency, or their credibility.

Thus, an idiot cannot be a witness; neither can a very immature infant. These objections go to the person. As to character generally, a wife cannot be a witness for or against her husband. Neither can a man, who, rejecting belief in God, and the immortality of the soul, avows himself to be without religion, be a witness. Then again, as to competency, a witness may be interested which ever way the verdict may pass; and as to credibility, a witness may be of habits so notoriously profligate and bad, as that confidence in what he might swear would be foolishly misplaced.

Objections founded on all these matters, except the last, are generally raised upon the *voire dire*, or before, or at the time, the witness offers himself in court to be sworn. See title *Voire dire*.

Incidental to the trial, will also be found the right of challenge of one or more of the jurors, in respect of unfitness to sit upon that jury. Unfitness may have reference to near relationship to

one or both of the parties, or to personal unfitness, as idiocy or lunacy. See title *Challenge, Challenge of Jury*. Or, as incidental to trial, may be mentioned, the withdrawing a juror. See title *Juror, Withdrawing Juror*.

Verdict, it has been seen, is the judgment pronounced by the jury, and incidental to this, is its being bad in point of form.

Upon the verdict stated and returned by the *postea*, the final judgment is recorded, either in favour of the plaintiff or of the defendant. But as one of the parties may not be satisfied with the verdict, such party, if defendant, may, in a given time, that is to say, before the expiration of the rule for judgment, move the court for a rule to shew cause why the verdict should not be set aside, and a nonsuit entered; or why the verdict should not be set aside, and a new trial had; or if the party dissatisfied with the verdict be the plaintiff, his motion will be for a rule to shew cause why the verdict should not be set aside, and a new trial had. And it is open to either party, as he may be advised, to move for a rule to shew cause why the verdict should not be set aside, and why it should not be entered for the opposite party. See *Trial*, sect. VI., *New Trial*.

Incident, also, to the judgment, is arrest of judgment. Arrest of judgment is founded upon some matter appearing on the record, but which militates against the finding of the jury, upon which the judgment shall have been founded. Thus, although a verdict will cure a title defectively set forth, yet, if the title set forth be in itself defective, no verdict can stand, but final judgment thereon will be arrested. See title *Arrest of Judgment*.

Another incident to the judgment is the writ of error. See title *Error, Writ of Error*.

This writ may issue upon error appearing on the record, or for matter *dehors*, without, or extraneous to the record, or not appearing thereon. Thus, if it appear upon the record that one count of the declaration is bad, and the damages shall have been assessed upon the whole declaration, it is error. So where an infant appears by attorney, it is error; but here the infancy is matter *dehors* the record; yet it is a ground of error.

The last principal title is *Execution*; and this consummation of a civil suit comprehends many means; as against the person, see title *Capias ad satisfaciendum*; against the freehold estate, see title *Elegit*; against the goods and chattels of a lay person, see title *Fieri Facias*; or against the living of an ecclesiastical or beneficed person, see title *Levari Facias*.

But to all these means, the motion for setting them aside for informality, or because they may have issued irregularly, is incident. So where the issuing them has been postponed beyond a year and a day; or where, by reason of death or bankruptcy, or other circumstances affecting the person originally entitled to the benefit of the judgment, has occurred, the writ of *scire facias* is incident. See title *Scire Facias*.

The foregoing observations have reference to a defended suit, or to that suit wherein the matter of complaint is disputed; but it very often happens, that soon after the commencement of the suit, the plaintiff neglects to proceed, and hence is incident to such suit the judgment of *non pros*, as it is termed in practical language, being an abbreviation of *non prosequitur*, the plaintiff does not or has not prosecuted his plaint. See title *Non pros*.

It also may happen that the defendant may not defend the action when brought, but, in order to save himself expense, he may be willing to forego the various steps or means of protraction and defence; and it is thus that *cognovit* and *warrant of attorney* become incidents to practice; but it should be noticed, that the warrant of attorney is not necessarily incident to a suit, although the *cognovit* is. See titles *Cognovit*. *Warrant of Attorney*.

It also frequently occurs, that the plaintiff pursuing his writ once issued, is neither answered or impeded by the defendant. At a certain period, limited in practice, the plaintiff becomes entitled, first to appear or file common bail for the defendant; for it is a rule in practice, that no defendant can be exposed to the consequences of a civil judgment, unless he either appear himself or the plaintiff appear for him. If the defendant appear and do nothing more, that is to say, if he do not plead to, or answer the declaration; or if he do not appear and plead, and the plaintiff appear for him according to the statute, the plaintiff thereby

entitles himself to a judgment by default, or, as called in practice, to *interlocutory judgment*. But, as upon this judgment, damages sustained by the plaintiff remain to be assessed or ascertained, there issues a writ of inquiry, directed to the sheriff, to impanel a jury, who are to inquire of the damages. See titles *Appearance, according to the Statute. Interlocutory Judgment. Inquiry, Writ of Inquiry.*

The *writ of inquiry*, like all other writs, is to be returned; and the final judgment signed thereon, is, like every other judgment, open to be impeached by writ of error, or by summary motion, made to the court upon some matter, either of informality or irregularity in the issuing, or in the execution.

Several other titles may be enumerated as incidental to the original suit; as, for instance, the *Rule to compute*.

This rule is granted where the writ of inquiry would only enhance expense or occasion delay unnecessarily. For where the amount of the damages to be assessed is obvious; as upon a bill or note for a sum certain; upon a bond conditioned for the payment of a sum certain, or where the demand is for rent under a demise by indenture, the writ of inquiry, by a jury, through the medium of the sheriff, could elicit nothing more than what the mere production of the instrument would disclose, namely, that such a sum was secured or acknowledged by the defendant to be due to the plaintiff. The court, on being moved for this purpose, therefore, directs its officer to make the necessary computation. See titles *Bill of Exchange and Promissory Note. Rent. Rule to compute.*

Several other titles may be consulted, as, *Prisoner*, or *Replevin*, and where the removal of a cause from an inferior jurisdiction becomes incident to such cause, the following titles may be consulted, viz. *Habeas Corpus faciendum et recipiendum. Certiorari. Recordari facias loquelam*, or *Re. fa. lo.* so called from the first syllable of each of these words. Our ancestors affected these pleasantries, for even the grave authority for most shrewdly matters, *Dalton*, disports upon the subject of returns of writs, in verse; wherein, for its purpose of running well, every word is coupé of its fair proportion, to the eye at least. But the learned know the hidden sense, and are enabled to untwist what lies beneath its hidden harmony.

It will hence appear, that for the purpose of acquiring a connected view of the civil suit in the courts of King's Bench and Common Pleas, the subjoined titles may be usefully read in the order in which they stand in the following columns :

Action.	Bill of Exception.
King's Bench, Court of.	Verdict.
Common Pleas, Court of.	Special Verdict.
Trespass, Action of Trespass.	Damages.
Case, Action on the Case.	Postea.
Debt.	Judgment.
Detinue.	Scire Facias.
Covenant.	New Trial.
Trover.	Arrest of Judgment.
Ejectment.	Reversal of Judgment.
Real Action.	Error.
Replevin.	Execution.
Right, Writ of Right.	Capias ad Satisfaciendum.
Quare Clausum Fregit.	Fieri Facias.
Quare Impedit.	Levari Facias.
Original Writ.	Sheriff.
Latitat.	Attachment against Sheriff.
Bill of Middlesex.	False Return.
Capias ad Respondendum.	Escape, Action of Escape.
Process.	Original.
Recordari Facias Loquelam.	Outlawry.
Pone.	Exigi Facias.
Affidavit of Debt.	Capias Utlagatum.
Arrest.	Reversal of Outlawry.
Bail Bond.	Plea, Pleading.
Bail, Common.	Summons and Order.
Appearance.	Delay.
Bail, above.	Demurrer.
Declaration.	Paper-book,
Demurrer.	Concilium.
Issue.	Motion.
Brief.	Inquiry, Writ of Inquiry.
Jury.	Rule to Compute.
Special Jury.	Bill of Exchange and Pro-
Subpoena.	missory Note.
Witness.	Prisoner.
Trial.	Habeas Corpus.
Nonsuit.	Removal of Cause.

INDEX

TO

TITLES, &c. CONTAINED IN THIS VOLUME.

ABATE - - - -	Page 1	AC ETIAM - - - -	Page 9
ABATEMENT, <i>Pleading in</i>		Also see	
Abatement - - - -	ib.	Bail, <i>Where discharged or not.</i>	
Also see		Bill of Middlesex.	
Abate.		Capias.	
Addition.		Latitat.	
Cassetur billa et breve.		ACKNOWLEDGMENT OF DEBT.	
Coverture.		See Limitations, <i>Statutes of Limitations of Actions.</i>	
Infancy.		ACQUITTAL - - - -	ib.
Misnomer.		ACTION. K. B. C. P. - -	11
Nonjoinder.		Also see	
Variance.		Annuity.	
— of the suit by death, or other circumstances affecting the person - - -	5	Assumpsit.	
Also see		Attachment of Privilege.	
Bankrupt.		Attorney.	
Judgment.		Bill of Middlesex.	
Scire Facias.		Case.	
Suggestion.		Covenant.	
—, <i>Of Writ of Error</i>	6	Debt.	
Also see		Detinue.	
Error, Writ of, sect. IV.		Ejectment.	
ABBREVIATIONS - - -	7	Latitat.	
See Attorney, sect. I. p. 119. Sect. IV.		Limitations, <i>Statutes of Limitations of Actions.</i>	
ABIDING, by Plea - - -	ib.	Members, &c.	
ACCEDAS AD CURIAM	8	Original Writ.	
Also see		Peers.	
Recordari facias loquelam.		Prisoner.	
Roplevin, sects. I. V.		Roplevin.	
ACCORD AND SATISFACTION - - - -	ib.	Trespass.	
ACCOUNT, <i>Action in</i> - - -	ib.	Trover.	
VOL. I.		AD ADMITTENDUM CLERICUM - - - -	ib.
		See Quare Impedit.	

	Page		Page
ADDING PLEA OR PLEAS	11	AGENT	29
Also see Plea, Plead- ing, sect. VIII.		Also see	
ADDITION	12	Attorney.	
ADJOURNMENT-DAY	ib.	Certificate, <i>Attor- ney's Certificate.</i>	
-----, <i>In</i>		AGREEMENT BY ATTOR- NEY	30
<i>Error</i>	ib.	Also see	
Also see		Cognovit.	
Entering Cause for Trial.		Error.	
Notice of Trial.		Execution.	
----- <i>Of Essoign.</i>		Notice, Stamp.	
See Non Pros.		AID PRAYER	31
----- <i>Of the Execution of Writ of Inquiry.</i>		AIEL, or BESAIEL	ib.
See Inquiry, <i>Writ of Inquiry.</i>		ALIAS	ib.
ADMINISTRATOR.		See the writs under their respective titles.	
See Executor.		ALIEN	ib.
----- DE BO-		Also see	
NIS NON.		Arrest, <i>Who privi- leged from.</i>	
See Scire Facias, No. 27, Forms.		Bail Bond, p. 206.	
ADMIRALTY COURT.		Habeas Corpus.	
See Limitations, <i>Sta- tutes of Limitations of Actions.</i>		ALIEN ENEMY	ib.
ADMISSION AND RE-AD- MISSION OF AN AT- TORNEY	ib.	ALLOCATUR	32
See Attorney.		Also see Attachment for Non-payment of Costs on Allocatur.	
Certificate, <i>Attor- ney's Certificate.</i>		ALLOWANCE TO A PRI- SONER	ib.
ADMISSIONS	ib.	See Assignee of In- solvent Debtor un- der Lord's Act.	
ADVOWSON.		AMBASSADOR	40
See Quare Impedit.		AMENDMENT, Cases, &c.	
AFFIDAVIT	ib.	K. B. C. P.	42
----- OF DEBT	ib.	Alphabetical Arrangement of Pleadings and Acts, as to which Amend- ments have and have not been allowed	44
See Trover.		Also see	
-----, <i>generally</i>	26	Motion.	
Also see		Summons.	
Affidavit of Debt. Prisoner.		AMERCEMENT	57
AFFIRMANCE-DAY	29	Also see Attachment against Sheriff.	
Also see Adjournment- day, in <i>Error.</i>			
AFFIRMATION	ib.		
Also see			
Attorney, sect. I. p. 120. Moravians.			

TABLE.

xxvii

	Page		Page
AMOVEAS MANUM.		ARBITRATION. <i>Where the proceeding is by order of nisi prius</i>	80
See Outlawry.		Also see Attachment for Contempt.	
Reversal of Outlawry.		Stamp.	
ANCIENT DEMESNE.		ARGUMENT.	
See Accedas ad curiam.		See Demurrer.	
Recordari facias loquelam.		Error.	
ANNUITY, Action of Annuity	57	ARRAY, Challenging.	
ANNUITY - - - - -	ib.	See Challenge, Challenge of Jury.	
Also see Warrant of Attorney.		Jury.	
APPEAL - - - - -	63	ARREST FOR DEBT - - -	84
APPEARANCE, Common Appearance - - - - -	ib.	Alphabetical List of Persons exempt from arrest in Civil Cases - - -	90
Also see		Also see	
Bail, Common.		Attachment against Sheriff.	
Infant.		Bail Bond.	
Prisoner.		Bailiff.	
_____, <i>Of entering Appearance by the Plaintiff, according to the statute</i>	64	Discontinuance.	
Also see		Exaction.	
Arrest for Debt.		Extortion.	
Distringas.		Gaoler.	
Member of Parliament.		Misnomer.	
Peer.		Prisoner, Statutory Provisions, &c.	
_____, <i>C. P. Discharge on Common Appearance</i> - - - - -	66	Sheriff.	
Also see		_____, OF JUDGMENT - - -	92
Affidavit, generally.		ASSAULT, Action for, or trespass vi et armis - - -	95
Bail, Common.		Also see Limitations, Statutes of Limitations of Actions, Table of, p. 910.	
_____, <i>Filing same according, &c.</i>		ASSIGNEE, Affidavit by Assignee.	
_____, DAY - - - - -	ib.	See Affidavit, pp. 22, 23.	
Also see		Bankrupt.	
Return-days of Writs.		The next Head.	
Term.		_____, <i>of Insolvent Debtor under the Lord's Act</i> - - -	95
APPOINTMENT, By the Master or Prothonotary - - -	67	Also see	
See Attorney.		Allowance to Prisoner.	
Bill of Exchange and Promissory Note.		Insolvent Debtor.	
Jury.		ASSIGNMENT.	
Special Jury.		See New Assignment.	
Taxation of Costs.		_____, OF ERROR.	
ARBITRAMENT - - - - -	ib.	See Error, sects. V. VI.	
ARBITRATION - - - - -	ib.		

	Page		Page
ASSISE OR ASSISES	97	ATTAINT. <i>Writ of Attaint</i>	113
——, <i>Writ of Assize</i>	<i>ib.</i>	Also see New Trial.	
—— OF MORT D'AN- CESTOR	<i>ib.</i>	ATTORNEY AT LAW	114
Also see Right, <i>Writ</i> of Right.		I. Abstract of Statutes	115
ASSISSORS	<i>ib.</i>	and	
ASSOCIATE	98	II. Rules and Orders	125
ASSUMPSIT, <i>Action upon</i> the Case on	<i>ib.</i>	III. Cases, &c. on articles of clerkship and admis- sion	127
ATTACHMENT	99	IV. Practical Directions as to articles of clerkship and admission, K. B.	128
——, <i>Attachment against</i> the Sheriff	<i>ib.</i>	V. Practical Directions as to articles of clerkship and admission, C. P.	129
Also see Affidavit. Bail, above.		VI. Forms relating to ar- ticles of clerkship and admission	<i>ib.</i>
—— against the late Sheriff	108	VII. Cases on delivery, taxation of, and action for, attorney's bill	130
—— against the Bailiff of a Liberty	109	VIII. Practical Direc- tions as to delivery of attorney's bill	134
—— of Privilege. See Attorney, sect. XIII.		IX. Practical Directions as to proceeding to tax an attorney's bill, K. B.	135
—— on Interrogatories. See Interrogatories.		X. Practical Directions as to proceeding to tax an attorney's bill, C. P.	136
—— against a Witness	<i>ib.</i>	XI. Cases on lien of the attorney on money reco- vered, and on deeds and papers, for his bill	<i>ib.</i>
Also see Subpoena. Witness.		XII. Cases as to attorney generally; his liabili- ties, privileges, &c.	138
—— against Peers. See Peer, Proceed- ings against a Peer.		XIII. Rules and cases as to proceedings by attor- ney, <i>plaintiff</i> , generally	146
—— for Non-performance of an Award. See Arbitration, p. 80. Reference.		XIV. Practical Direc- tions as to proceedings by attorney, <i>plaintiff</i> , K. B.	148
—— for Non-payment of Costs on Allocatur	110	XV. Forms of proceed- ings by attorney, <i>plain- tiff</i> , K. B.	<i>ib.</i>
Also see Arrest, head At- torney, Table. Attorney, sect. XII. p. 146.		XVI. Cases in proceed- ings against attorney, K. B.	149
—— for not paying Money on a Composition for Penal- ties under Rule of Court	112	XVII. Practical Direc- tions as to proceedings against attorney, K. B.	150
—— for Contempt	<i>ib.</i>		
Also see Prisoner.			
—— Foreign. See Foreign Attachment.			
ATTAINDER	113		

TABLE.

xxix

	Page		Page
ATTORNEY AT LAW, (cont.)		BAIL <i>above, or Special Bail</i>	163
XVIII. Forms of proceedings <i>against</i> attorney, K. B. -	150	Also see	
XIX. Cases on proceedings <i>by</i> attorney, <i>plaintiff</i> , C. P. -	151	Arrest, p. 69.	
XX. Practical Directions as to proceedings <i>by</i> attorney, <i>plaintiff</i> , C. P. -	152	Escape.	
XXI. Forms of proceedings <i>by</i> attorney, <i>plaintiff</i> , C. P. -	ib.	Exoneretur.	
XXII. Cases in proceedings <i>against</i> attorney, C. P. -	153	Original Writ.	
XXIII. Practical Directions as to proceedings <i>against</i> attorney, C. P. -	ib.	Sheriff.	
XXIV. Forms of proceedings <i>against</i> attorney, C. P. -	154	Trover.	
ATTORNEY-GENERAL -	156	Venue, sect. I.	
ATTORNMENT -	ib.	Waiver.	
See Ejectment.		— BOND -	196
AVERMENT, Writ of Averment -	157	—, <i>Assignment of</i>	198
Also see		BAIL. Proceedings against	
Original.		<i>Bail on Recognizance</i> -	208
Quare Clausum Fregit.		Also see Amendment,	
AVOIDANCE.		<i>Table</i> , head Scire	
See Plea, Pleading, p. 1026.		Facias on Recognizance against Bail,	
AVOWRY.		p. 56.	
See Replevin, sect. IV.		— <i>In Error.</i>	
AUDITA QUERELA -	ib.	See Error, sect. II.	
Also see Bail.		— <i>Their Power over the</i>	
AUTER ACTION PEN-DENT -	159	<i>Principal</i> -	239
AUTHORITY OF LAW -	ib.	—, <i>Surrender in Discharge</i>	
AWARD -	ib.	<i>of Bail</i> -	240
See Arbitration, p. 67		—, <i>Before Judgment against</i>	
Attachment.		<i>Principal</i> -	241
BAIL, Common -	167	—, <i>Surrender after Judgment against Principal</i> -	246
Also see		—, <i>Where Error brought</i>	247
Affidavit.		—, <i>Costs on Surrender</i> -	249
Appearance.		Practical Directions, K. B.	250
Arrest.		The like C. P. -	251
Warrant of Attorney, sect. V.		Forms -	252
— <i>Filing Common Bail according to the Statute</i> -	168	—, <i>Where discharged or not</i>	ib.
		Also see	
		Bail, <i>Proceeding against on Recognizance.</i>	
		Bankruptcy.	
		Cognovit.	
		BAILIFF -	254
		Also see	
		Arrest, pp. 89, 90.	
		Bail.	
		Bail Bond.	
		Escape.	
		Execution.	
		Extortion.	
		Gaoler.	
		Sheriff.	

	Page		Page
BALLOTING ACT.		BILL - - - -	270
See Jury.		Also see	
BANK OF ENGLAND.		Member of Parlia-	
See Inspection of Books.		ment.	
NOTE - - - -	255	Peer.	
Also see		Prisoner.	
Affidavit of Debt,		— <i>against an Attorney.</i>	
p. 18.		See Attorney, K. B.	
Tender.		sects. XVI. XVII.	
BANKRUPT - - - -	ib.	XVIII. C.P. sects.	
Also see		XXII. XXIII.	
Arrest, p. 91.		XXIV.	
Bail Bond.		— OF COSTS.	
Set-off.		See Attorney, sects.	
— — — — —, <i>Assignees of</i> -	262	VII. VIII. IX. X.	
BANKRUPTCY - - - -	263	XI.	
Also see		— OF EXCEPTIONS -	ib.
Bail, <i>Where discharg-</i>		— OF EXCHANGE AND	
ed or not, p. 253.		PROMISSORY NOTE -	275
Bail Bond, p. 205.		Also see	
Bankrupt.		Affidavit, p. 21.	
Exoneretur.		Rule to Compute.	
Scire Facias, sect. V.(a).		— <i>against Member of Par-</i>	
BAR. <i>Plea in Bar.</i>		liament.	
See the Special Plea		See Member of Par-	
in Bar by its Title,		liament.	
and Plea, Pleading.		— <i>against a Peer.</i>	
BARGAIN AND SALE.		See Peer.	
See Inrolling Deed.		— <i>against a Prisoner.</i>	
BARON AND FEME - - - -	265	See Prisoner.	
Also see		— OF MIDDLESEX -	277
Abatement.		Also see	
Affidavit, pp. 21. 24.		Ac etiam, Forms.	
Arrest, p. 91.		Affidavit, Forms.	
Feme Covert.		Alias.	
Fine.		Process.	
Judgment, No. 32,		— OF PARTICULARS.	
Forms, p. 876.		See Particulars.	
Scire Facias, sect. IV.		BLACK ACT.	
BARRISTER.		See Hundredors.	
See Arrest, Table, p. 91.		BOARD OF GREEN	
BATH, City of - - - -	270	CLOTH, Of the King's	
BATTEL - - - -	ib.	Household - - - -	279
See Right, Writ of		BODY, Rule to bring in the	
Right.		Body - - - -	280
BERWICK-UPON-TWEED ib.		Also see	
		Attachment	
		against Sheriff.	
		Bail above.	

TABLE

xxx

	Page		Page
BONA NOTABILIA	- 280	CAPIAS AD SATISFA-	
See Venue, p. 1357.		CIENDUM	- 306
BOND	- ib.	Also see	
Also see		Amendment, p. 46.	
Bail Bond.		Bail.	
Breaches, <i>Sug-</i>		Elegit.	
<i>gestion of Breaches</i>		Execution.	
<i>under the Statute.</i>		Fieri Facias.	
BOOK.		Outlawry.	
See Demurrer, Paper-		Prisoner.	
Book.		UTLAGATUM	- 313
BOOKS, ROLLS, &c. In-		Also see Outlawry.	
spection of	- 281	IN WITHERNAM	325
BOOKS, Evidence of Books,		Also see Raplevin.	
Rolls, &c.		CA. SA.	
See Evidence, and		See Capias ad Satis-	
Table subjoined.		faciendum.	
BOTTOMREE BOND	- 282	CAPIATUR	- 327
BRÈACHES, Suggestion of		CARRYING IN THE ROLL.	
<i>Breaches under the Statute</i>		See Dogget.	
8 & 9 W. III. c. 11. s. 8.	- ib.	CASE, <i>Action on the Case</i>	- ib.
Also see Scire Facias,		Also see	
sect. III. p. 1229.		Assumpsit.	
BRIBERY	- 297	Limitations, <i>Sta-</i>	
Also see Venue.		<i>tutes of Limita-</i>	
BRIEF	- 298	<i>tions of Actions,</i>	
Also see		<i>Table of, p. 910.</i>	
Evidence.		Directed out of Chan-	
Witness.		cery	- 330
BRIXTON, East Half Hun-		Also see Special Case.	
dred of Brixton	- 301	CASSETUR BILLA;	
Also see Costs, p. 390.		BREVE	- ib.
BYE LAWS	- ib.	Also see Dogget.	
BY-THE-BYE,		CAUSE.	
See Declaration.		See Entering Cause.	
CAPIAS	- ib.	CEPI CORPUS	- 331
Also see		CERTIFICATE, <i>Attorney's</i>	
Original, <i>Proceedings</i>		<i>Certificate</i>	- ib.
<i>by Original.</i>		Bishop's.	
Oyer.		See Dower, pa. 515.	
CAPIAS AD RESPON-		Of Marshal, or	
DENDUM, C. P.	- 302	<i>Gaoler, or his Copy of Causes</i>	336
Also see		Also see	
Ac etiam.		Allowance to Pri-	
Affidavit of Debt.		soner.	
Amendment, <i>Table,</i>		Prisoner.	
Capias.			
Direction of Writs.			
Process.			

	Page		Page
CERTIFICATE, Bankrupt's Certificate.		CHESTER.	
See Bankrupt.		See Counties Palatine.	
———, <i>Judge's Certificate</i>	336	Direction of Writs.	
Also see		CHIROGRAPHER -	353
Costs, pa. 385, &c.		Also see Fine.	
Jury, <i>Special Jury</i> .		CHRISTIAN NAME.	
———, <i>Trial by Certificate</i>	337	See Abatement.	
CERTIFICATION OR CERTIFICATE OF ASSIZE -	338	Misnomer.	
CERTIFY THE RECORD,		CHURCHWARDEN -	ib.
<i>Rule to Certify the Record</i> -	ib.	Also see Constable	
Also see		and Headborough.	
Diminution, Rule		CINQUE PORTS -	ib.
to allege Dimi-		Also see Direction of	
nution.		Writs.	
Error.		CIRCUITS -	354
CERTIORARI, In Error,		CIRCUITY OF ACTION -	ib.
From C. P. to K. B. -	341	CLERGYMAN -	355
Practical Directions in		Also see	
Error, from K. B. to		Levari Facias.	
Exchequer Chamber -	345	CLERK. Attorney's Clerk.	
The like, from C. P. to K. B.	346	See Attorney, sects. I.	
Forms -	ib.	II. III.	
——— <i>To remove a Cause</i>	347	CLERK OF THE DECLARATIONS -	ib.
Also see Habeas		COGNIZANCE.	
Corpus cum causa.		See Conusance.	
CESSET EXECUTIO -	350	Replevin.	
Also see Scire Facias.		COGNOVIT ACTIONEM -	ib.
——— PROCESSUS -	ib.	Also see Warrant of	
Also see Stet Pro-		Attorney.	
cessus.		COLOUR -	358
CESTUI QUE TRUST.		COMMISSIONERS of Bank-	
See Execution, sect. III.		<i>rapt</i> -	ib.
Fieri Facias, sect. II.		See Witness.	
Set-off, <i>Notice of Set-</i>		——— <i>for Auditing Public</i>	
<i>off</i> , p. 1271.		<i>Accounts.</i>	
CHALLENGE OF JURY -	351	See Witness.	
Also see		——— <i>to take Affidavits</i> -	359
Jury.		——— <i>for taking Recogni-</i>	
Right, <i>Writ of Right</i> .		<i>zances of Bail</i> -	ib.
Tales.		Also see Bail, above.	
CHANGING THE ATTOR-			
NEY -	353		
Also see			
Attorney, sects. II.			
XII.			
Motion.			
Summons.			

TABLE.

xxxiii

	Page		Page
COMMISSION OF BANK- RUPT.		CONFESSION.	
See Bankrupt.		See Cognovit Actio- nem.	
COMMITMENT - - -	359	Judgment, pa. 863, and also Forms subjoined to Judgment.	
COMMITTITUR - - -	ib.	CONSOLIDATION RULE	367
Also see Bail, Sur- render in discharge of Bail, pages 240, 250.		CONSTABLE AND HEAD- BOROUGH - - -	369
COMMITTITUR PIECE -	ib.	Also see	
Also see Prisoner.		Churchwardens.	
COMMON PLEAS, Court of	360	Costs, pa. 401.	
Also see		CONSULTATION, Writ of	
Attorney, sect. V.		Consultation - - -	371
X. XIX. XX.		Also see Prohibition.	
XXI. XXII.		CONTEMPT - - -	374
XXIII. XXIV.		Also see Attachment for Contempt.	
Original, Special, C. P.		CONTINGENT DAMAGES	ib.
Quare Clausum		Also see	
Fregit.		Demurrer.	
COMPERUIT AD DIEM,		Issue, Forms, No. 7.	
Plea of - - -	363	No. 12.	
Also see Nul tiel		CONTINUANCE - - -	ib.
record.		Also see	
COMPOUNDING PENAL		Discontinuance.	
ACTIONS - - -	364	Imprarlance.	
COMPULSIVE CLAUSES		Issue.	
IN LORD'S ACT.		Judgment.	
See Insolvent Debtor.		Limitations, Sta- tutes of Limita- tions, p. 914, &c.	
COMPUTE, Reference to		Venire.	
Compute.		CONTINUANCE OF NO- TICE OF TRIAL - -	377
See		Also see	
Bill of Exchange		Countermand of	
and Promissory		Notice, &c.	
Note.		OF NOTICE	
Bond.		OF EXECUTING, &c.	
Covenant.		WRIT OF INQUIRY -	ib.
Lease.		CONTRACTS.	
Rent.		See Payment of Mo- ney into Court, pa. 1013.	
Rule to compute.		CONVICTION.	
CONCILIIUM OR CONSI- LIUM - - -	366	See Trial, sect. VI.	
Also see			
Demurrer.			
Dogget, Doggeting			
Roll.			

	Page		Page
CONVOCATION, <i>Members</i>		COSTS, (<i>continued.</i>)	
<i>of Convocation</i> - - -	378	Costs on some counts, &c.	402
Also see Arrest,		Costs on judge's certificate	404
<i>pa.</i> 84.		Single, double, and treble	
CONUSANCE OR COGNIZANCE - - -	<i>ib.</i>	costs - - -	<i>ib.</i>
COPY OF DEEDS, INSTRUMENTS, &c. - -		Costs on arbitration	405
See <i>Qyer.</i>		Attorney's costs on taxing	<i>ib.</i>
COPY OF PROCESS - - -	382	Defendant's remedy for costs	<i>ib.</i>
Also see <i>Service.</i>		Set-off, of costs	406
CORONER - - -	<i>ib.</i>	Costs where debt paid	407
Also see		— on taking money out of court	<i>ib.</i>
Distringas.		— between parties	408
Elisors.		— on some counts	<i>ib.</i>
Habeas Corpora.		And see <i>pa.</i> 403.	
Jury.		— of cause and of issues	409
Venire.		Taxation of costs	410
CORPORATION - - -	<i>ib.</i>	Also see	
Also see		Arbitration, <i>p.</i> 80.	
Allowance to Prisoner, <i>pa.</i> 36.		Attorney, <i>p.</i> 134.	
Distringas.		Bankrupt.	
Inspecting Books.		Declaration.	
Peer.		Ejectment.	
COSINAGE OR COSENAGE, <i>Writ of</i> - - -	383	Error.	
COSTS - - -	384	Executor.	
Plaintiff's general right to costs	<i>ib.</i>	Feigned Issue.	
— restrained	385	Payment of Money into Court, <i>pa.</i> 1018.	
Local acts	387	Replevin, <i>sect.</i> VII.	
Revenue officers	393	Security for Costs.	
Against justices	<i>ib.</i>	Set-off.	
In actions on judgments	<i>ib.</i>	Subpoena.	
— for slander	394	Suggestion.	
Double and treble costs	<i>ib.</i>	Trespass.	
Pleading double	395	Trial, <i>sect.</i> VI.	
Defendant's costs	<i>ib.</i>	Witness.	
Executor's liability, &c.	396	COVENANT - - -	411
Informer liable to costs	<i>ib.</i>	Also see	
Where plaintiff recovers less, &c.	<i>ib.</i>	<i>Ac etiam</i> , <i>pa.</i> 9.	
Costs on delay	400	Breaches, <i>pa.</i> 282.	
— on demurrer	<i>ib.</i>	Costs, <i>pa.</i> 384.	
— in trespass, where several defendants	401	Declaration.	
Where justices, &c. shall recover costs	402	COVERTURE - - -	413
		Also see	
		Abatement.	
		Baron and Feme.	
		COUNSEL - - -	<i>ib.</i>

	Page		Page
COUNTERMAND OF NO-		DAMAGES	419
TICE	413	Also see	
COUNTS.		Contingent Damages.	
See Costs, pp. 402.		Costs, pa. 384.	
408.		Customs and Ex-	
COUNTY COURT	414	cise, pa. 417.	
Also see Justices,		Ejectment.	
Writ of Justices.		Inquiry, Writ of	
PALATINE	ib.	Inquiry.	
Also see		Justices.	
Arrest, pa. 84.		Rule to compute.	
Costs.		Verdict.	
Direction of Writs.		Warranty.	
Ely.		DARREIN PRESENT-	
Error.		MENT	422
Judgment.		Also see	
Trial, sect. IV.		Quære Impedit.	
Venue.		DATE, Indorsement of Date	
COURTS.		on. Process.	
See Common Pleas,		See Process.	
Court of.		DAY IN BANK	423
County Court.		RULE OR DAY-	
King's Bench,		WRIT	ib.
Court of.		Also see	
COURT OF REQUESTS.		Rules.	
See Attorney, sect. XII.		Term-rule.	
pa. 140.		DEATH	424
Costs, pa. 287.		Also see	
ROLLS	416	Abatement of the	
Also see		Suit by Death, &c.	
Books, Rolls, &c.		Demise, Demise of	
Inspecting of.		the King.	
CROWN, At the suit of the		Judgment.	
Crown	ib.	Warrant of Attor-	
CURSITOR	ib.	ney, sect. III.	
CUSTOM OR BYE-LAW	ib.	DE BENE ESSE	ib.
CUSTOM-HOUSE BOOKS,		Also see	
Inspecting of Custom-House		Declaration, sect. IV.	
Books	417	DEBT, Action of Debt	ib.
CUSTOMS AND EXCISE	ib.	Also see	
Also see		Ac etiam.	
Costs, pa. 384.		Affidavit of Debt,	
Notice, sect. I.		Forms.	
CUSTOS BREVIUM, K. B.	418	Bond.	
C. P.	ib.	Breaches.	
		Costs.	
		Declaration.	
		Judgment, Forms.	
		Limitations of Ac-	
		tions, Table of	
		Limitations of	
		Actions, pa. 910.	
		Venue.	
		Wager of Law.	

	Page		Page
DECEIT OR DISCEIT, Ac-		DELAY - - -	452
tion of <i>Deceit or Disceit</i> -	427	Also see	
		Bribery.	
DECLARATION - - -	428	Declaration.	
I. Practical points, com-		DEMAND - - -	454
mon to the form of de-		DEMISE, Death or Demise of	
claration, generally -	<i>ib.</i>	the King - - -	<i>ib.</i>
II. Practical points dis-		-----, <i>In Ejectment.</i>	
tinguishing the form of		See <i>Ejectment.</i>	
the declaration in each		DEMURRER - - -	<i>ib.</i>
court - - -	434	Also see	
III. Cases as to time for		Contingent Damages.	
declaring, K. B. -	<i>ib.</i>	Declaration.	
IV. Cases as to deliver-		Issue.	
ing and filing declara-		Judgment.	
tion, K. B. -	436	Nolle Prosequi.	
V. Practical Directions,		Paper Book.	
K. B. - - -	441	Plea, Pleading.	
VI. Forms, K. B. -	442	----- TO EVIDENCE	463
VII. Cases as to time for		Also see Bill of Ex-	
declaring, C. P. -	445	ceptions.	
VIII. Cases as to deliver-		DEPARTURE, Departure in	
ing and filing declara-		Pleading - - -	466
tion, C. P. - - -	<i>ib.</i>	DEPOSIT, Deposit in lieu of	
IX. Practical Directions,		Bail - - - - -	467
C. P. - - -	447	Also see	
X. Forms, C. P. -	448	Arrest, p. 84.	
XI. General Forms. -	449	Motion, p. 941.	
Also see		Poundage, p. 1061.	
Consolidation rule.		DEPOSITION, Deposition of	
Particulars, Bill		a Witness - - -	468
of Particulars.		DETAINER.	
Plea, Pleading,		See Outlawry.	
sect. I.		Prisoner, sections I.,	
Variance.		and III. (c). V. VI.	
Warrant of Attor-		DETINUE, Action of Detinue	472
ney.		Also see	
DEDIMUS POTESTATEM.		Ac etiam.	
See Fine, sects. IV. V.		Affidavit of Debt.	
Recovery, sects. IV. V.		Declaration, No. 13,	
DEEDS.		Forms.	
See Oyer.		Fieri Facias.	
Subpoena.		Limitations of Ac-	
DEFAULT.		tions, Table, pa.	
See Judgment by De-		910.	
fault.		DEVASTAVIT - - -	473
DEFEASANCE - - -	451		
See Warrant of At-			
torney.			
DEFENCE - - -	<i>ib.</i>		

TABLE.

xxxix

ENTRY OF RECOGNIZANCE.

See *Bail, Proceedings against Bail on Recognizance.*

OF SCIRE FACIAS.

See *Scire Facias.*

ERROR, *Writ of Error* - 602

I. Of error generally, before bail. - *ib.*

II. Of bail in error - 613

III. Of proceedings in error subsequent to bail. Amendment. Motion to quash - 618

IV. Of abatement in error - 620

V. Of the period for assignment of errors, and alleging diminution. Certiorari. Quare executionem non, in error from C. P. to K. R. - 621

VI. Of assignment of errors on the part of plaintiff in error. The like on the part of the defendant in error. Pleading in error - 622

VII. Of the issue in error. Entry of the proceedings on the roll, where on a different roll. Of the trial of an issue in fact - 625

VIII. Of the judgment in error - *ib.*

IX. Of costs in error. Of interest - 627

X. Of execution in error - 631

XI. Of restitution to the party - *ib.*

XII. Practical Directions in error from K. B. to Exchequer Chamber - 632

XIII. Practical Directions in error from K. B. and Exchequer Chamber to House of Lords in Parliament - 637

XIV. Practical Directions in error from C. P. to K. B. - 639

ERROR, (*continued.*)

XV. Practical Directions in error, *coram nobis* or *vobis.* - 644

XVI. Forms - 646

Also see

Certify the record,
Rule to certify the Record.

Certiorari, *In error.*
Diminution.

False Judgment.

ESCAPE - 666

Also see *Escape Warrant.*

WARRANT - 670

ESSOIN OR ESSOIGN, &c. *ib.*

ESTOPPEL - 671

Also see

Arrest.
Bail Bond.
Mistomer.

EVICTIOIN - *ib.*

EVIDENCE - 672

Of Testimony - *ib.*

Records - 674

Alphabetical Table - 675

EXACTION.

See *Extortion.*

EXCEPTIONS.

See *Bill of Exceptions.*

Demurrer to Evidence.

EXCISE.

See *Customs and Excise.*

EXCOMMUNICATION - 690

EXECUTION - *ib.*

I. Of the period of the action at which execution may issue - 691

II. Of the writ of execution generally. Practical points affecting the writ. The return of execution. Special or general execution under insolvent act. Action by and against the sheriff generally - 692

	Page		Page
EXECUTION, (continued.)		EXONERETUR	- 714
III. By and against whom execution may be issued - - -	694	Also see	
IV. Of the relation of time back to execution	696	Bail, <i>Surrender in Discharge of Bail.</i>	
V. Of the parties' remedy in case of irregular execution. Restitution	698	Bankruptcy.	
VI. Of the duty of the sheriff or other officer, in relation to execution; and how far the court will protect him -	699	Committitur Piece.	
VII. Of obstructing execution - - -	702	EXPENCES, Of Arbitration	
Also see		See Arbitration.	
Annuity.		_____, <i>Of Executions.</i>	
Error.		See Execution.	
Fieri Facias, s. III.		_____, <i>Of Witnesses.</i>	
Habere facias possessionem.		See Subpoena.	
Poundage.		Witness.	
Prisoner.		EXTENT, Writ of Extent	- 715
Sheriff.		See Elegit.	
Warrant of Attorney, sects. V.VI. pa. 1385, 6.		Execution.	
		Scire Facias.	
EXECUTOR AND ADMINISTRATOR - - -	703	_____, IN AID - - -	ib.
EXHIBIT - - -	710	EXTORTION - - -	719
EXIGENT. See the next title.		Also see	
EXIGI FACIAS, Writ of		Arrest.	
<i>Exigi Facias</i> - - -	711	Bailiff.	
Also see		Oppression.	
Capias Utlagatum.		Prisoner, Statutory Provisions in relation to the person of prisoner.	
Outlawry.		EXTRA COSTS - - -	720
		Also see	
		Costs, pa. 384.	

A
DICTIONARY
 OF
PRACTICE
 IN THE
COURTS OF KING'S BENCH
 AND
COMMON PLEAS.

ABATE, *To Abate*. If by plea a defendant shew to the court in which he may be impleaded, either that such court hath no jurisdiction in the matter alleged by the plaintiff, or that there exists some legal ground of objection operating in his own person or in that of the plaintiff to being impleaded, such as misnomer, infancy, or coverture of either party; or, lastly, that the proper forms of impleading him have not been observed; in all or in either of these cases the suit is said *to abate*, or to be abated. Practical definition.

ABATEMENT, *Pleading in*. See the above title; also **ADDITION**, **CASSETUR BILLA et BREVE**, **COVERTURE**, **INFANCY**, **MISNOMER**, **NONJOINDER**, **VARIANCE**.

Abatement cannot be pleaded without taking the declaration, if filed, out of the office; and it must be pleaded in four days, although rule to plead shall not have been given; or if given, irregularly. *Brandon v. Payne*, 1 *T. R.* 689. *Harbord v. Perigal*, 5 *T. R.* 210. Must be pleaded in four days.

But if partly in abatement and partly in bar, and filed after the four days, *quære* if judgment may not be signed for want of a plea? *Martindale v. Harding*, 1 *Chit. R.* 716. n.

In K. B. it must be filed; in C. P. filed or delivered; by nine o'clock in the evening of the last of the four days, otherwise judgment may be signed. *Jennings v. Webb*, 1 *T. R.* 277.

From the day of service of the notice of declaration four days are allowed for the filing or delivering this plea, whether the declaration be in *chief* or *de bene esse*. *Hutchinson v. Brown*, 7 *T. R.* 298. How computed.

The first and last of the four days are strictly reckoned inclusively; thus, if notice of the declaration be served the 8th, the plea must be filed or delivered by nine in the evening of the 11th. *Jennings and others v. Webb*, 1 *T. R.* 277. unless the last day be on a Sunday, and then being filed on the Monday will be in time. *Lee v. Carlton*, 3 *T. R.* 642. provided the notice be given, or the declaration be delivered before the last four days in term. *Long v. Miller*, 1 *Wils.* 23. but if afterwards so that the defendant would not be bound to plead that term, then the plea in abatement may be filed or delivered within the first four days of the subsequent term. When it may be pleaded the next term.

ABATEMENT, *Pleading in*; CASES.

When entitled to a special imparlance.

term; but except where presently mentioned, the plea must in that case be entitled of the preceding term, or a special imparlance be entered. *Blackmore v. Flemyng*, 7 *T. R.* 447. n. and the special imparlance *must* be entered on the record. *Doughty v. Lascelles*, 4 *T. R.* 520. And where the bill is filed in vacation as of the preceding term against an attorney, a plea in abatement may be put in in the first four days of the following term, entitled as of such term, and this without an imparlance. *Holme v. Dalby*, gent. 3 *B. & A.* 259. S. C. 1 *Chit. R.* 704.

Practice in C. P. as to imparlance.

When defendant is entitled to a special imparlance, he must apply to the prothonotary, who grants it of course, and the defendant may then plead in abatement, but not without. *Threlkeld v. Goodfellow*, *Bar.* 244. *Napper v. Biddle*, *ib.* 334.

When cannot be pleaded.

This plea cannot be pleaded after a *general imparlance*, *Evans, q. t. v. Stevens*, 4 *T. R.* 224. If it appear on the record to have been pleaded after general imparlance, it is bad on demurrer, or writ of error. *Buddle v. Willson*, 6 *T. R.* 369. So on demurrer, although not assigned for cause. *Lloyd v. Williams and others*, 2 *M. & S.* 484.

When pleaded *de bene esse*.

Ancient demesne allowed to be filed *de bene esse*, pending a rule nisi, for permission to allow the plea. *Doe, d. Morton v. Roe*, 10 *East*, 523; the plea itself being under discussion, not likely to be determined within the four days.

Cannot be pleaded after forfeiture of bail bond.

If the bail bond be forfeited, and the court in favor of the defendant *stay* proceedings thereon, a plea in abatement cannot afterwards be filed in the original action, but he must plead in chief. *Anon.* 2 *Salk.* 519.

Misnomer cannot be pleaded by attorney, without special warrant.

Defendant cannot plead misnomer by attorney, unless there be a special warrant of attorney; but if he do, it is not demurrable. *Cremer v. Wickett*, 1 *Ld. Raym.* 509. n. the plea may be refused. *Ib.*

In C. P. when plea to jurisdiction is bad. Where a whole term to plead in abatement.

After special imparlance, plea to jurisdiction and of privilege is bad. *Gib. C. P.* 184.

But if declaration be delivered against one in custody, he shall have the whole term to plead in abatement. *Anon.* 2 *Salk.* 515.

When well pleaded, although bail not perfected.

If in a country cause, defendant put in special bail in time, he may, although bail be not perfected, file plea in abatement within the four days, and that plea shall be held well filed, provided that the same bail justify. *Dimsdale v. Nielson*, 2 *East*, 406. But if defendant put in special bail within four days in a town cause, he is entitled to plead in abatement, provided such bail be afterwards perfected in time, though he had before put in other bail and given notice of justifying, but had withdrawn them in time. *Hopkinson v. Henry*, 13 *East*, 170. In a town cause, the defendant waited till his bail was perfected, and within four days *after* pleaded in abatement, but it was held out of time. 11 *East*, 411, 413. n.

When bad bail being perfected.

But in the Exchequer, if the defendant plead in abatement, he must justify as well as his bail within the first four days after the return of the writ, whether they be excepted against or not. *Maund v. Mawley*, *For.* 149.

Plea in abatement to be verified. Statute.

The stat. 4 & 5 Ann. c. 16. enacts that no dilatory plea shall be received in any court of record, "unless the party offering such plea do, by affidavit, prove the truth thereof, or shew some pro-

"bale matter to the court to induce them to believe that the fact of such dilatory plea is true."

Though the defendant may not have seen the declaration, a plea in abatement, with the usual affidavit may be filed; and (if in time) the plaintiff shall not be allowed to sign judgment for want of a plea. *Lang v. Comber*, 4 *East*, 348.

May be filed, although defendant may not have seen declaration.

A plea in abatement, unsupported by affidavit, may be set aside. *Sherman v. Alvarez*, *Str.* 639. *Cunningham v. Johnson*, *Say. Rep.* 19. *Pearce v. Davy*, *ib.* 293. *Rex v. Grainger*, 3 *Burr.* 1617.

Affidavit requisite.

The affidavit may be made by the attorney. *Lumley v. Foster*, *Bar.* 344. or by any third person. 1 *Chit. R.* 58.

By whom may be made.

And although it be bad if sworn before the defendant's attorney, yet the plaintiff cannot treat the plea as a nullity, but must move to set it aside. *Horsfall v. Matthewman*, 3 *M. & S.* 154. and it has been ruled, that where an affidavit is necessary to verify a plea, the affidavit referring to the plea needs not be entitled in the cause: if the plea be entitled it is sufficient. *Prince and others v. Nicholson*, executor, &c. 5 *Taunt.* 833; but if the title be stated incorrectly in the affidavit, the plea may be treated as null. *Richards v. Setree*, 3 *Price*, 197.

Where the matter pleaded in abatement is apparent on the record, no affidavit seems to be necessary. *Hughes v. Alvarez*, *Ld. Raym.* 1409.

When no affidavit necessary.

The plea in abatement should be certain; give the plaintiff a better writ, and have an apt and proper beginning and conclusion. 1 *Tidd*, 576. See also *Godson*, gent. one, &c. *v. Sarah Good*, administratrix, &c. 2 *Marsh. R.* 299. 1 *Sid.* 189, 190.

Requisites of the plea.

And where a plea begins and ends as a plea in abatement, it must be considered as such, though it contain matter in bar. *Id. ib.*

It cannot be amended. *Lyde v. Heale*, *P. R.* 21. *Dockeroy v. Lawrence*, *Cook Rep.* 29.

Cannot be amended.

In pleas to the person venue is unnecessary. *Neele v. De Garay*, 7 *T. R.* 243.

When venue unnecessary.

As oyer of the original writ cannot be granted, a defect in that writ cannot be pleaded in abatement. *Deshons v. Head*, 7 *East*, 383.

Cannot plead in abatement of original writ.

After plea in abatement, no objection can be taken to the declaration. *Harcourt v. Hastings*, 3 *Salk.* 19.

Waives objection to declaration.

In case of judgment of *respondeat ouster*, the plea in abatement and judgment need not, as formerly, be entered of record. 1 *Salk.* 4, 5. 7 *Mod.* 51. And see 1 *Tidd*, 755.

What need not as formerly be entered of record.

If the plea in abatement be *replied* to, and the fact denied and put in issue by the plaintiff, and that issue be found for him, the judgment is peremptory *Quod recuperet*, 2 *Saund.* 211 a. (3.)

Observations as to the judgment and costs.

On demurrer to plea, and judgment for the plaintiff there, or on demurrer to the replication to such plea, the judgment is *quod respondeat ouster (ib.)* and the defendant, in that case has only four days time to plead, or the court may order him to plead *instante*, or on the morrow. After this judgment, no further plea in abatement to the person of the defendant can be offered, but he may plead in abatement to that of the plaintiff, and if that be over-ruled, to the form of the writ. *Hell.* 126. But as to abatement to the form of the writ, see 7 *East*, 383.

ABATEMENT, *Pleading in*; PR. DI.; FORMS.

If, on the fact the judgment be for the defendant, he *is*, if on the law, he is *not*, entitled to costs. *Garland v. Exton, Ld. Ray. 992.*—in both cases the judgment is, that the writ or the bill be quashed. *Tidd, 666*, who cites *Gilb. C. P. 52. 3 M. & S. 453, 4.* or in case of pleading temporary disability or privilege, the judgment is, that the plaintiff remain without day, until, &c. *Ib.*

In abatement, only the proper judgment prayed for by the party pleading in abatement will be given. *The King v. Shakespeare, 10 East, 83. Attwood v. Davis, 1 B. & A. 172, 3.*

If plea be true,
what step to be
taken by plain-
tiff.

If the plea be true, the plaintiff may confess it, and enter a *nil capiat per breve*, without paying costs. *Allen and others v. Maxey, Bar. 120.* or he may amend on payment of costs. *Mestaer v. Herts, 3 M. & S. 450.*

In abatement, that the contract was made jointly with another, is proved, although he be an infant. *Gibbs v. Merrill, 3 Taunt. 307.*

For the law upon pleading in abatement, see *2 Wms. Saund. 208. 211 a. nn. (1)(2)(3).*

PRACTICAL DIRECTIONS.—K. B. C. P.

K. B.

The plea in abatement, and the affidavit to verify it, must be engrossed on the proper stamps, viz. plea, 4d., affidavit, 2s. 6d. The plea must be signed by counsel; fee 10s. 6d. The affidavit to be sworn before a judge in town, or a commissioner in the country, not the attorney in the cause, and with the plea, filed with the clerk of the papers.

C. P.

The plea and affidavit to be engrossed as above. Serjeant signing plea, 10s. 6d. The affidavit is to be sworn before a judge in town, or a commissioner in the country; but although it cannot be treated as a nullity, yet such commissioner must not be the defendant's attorney; with the plea annexed, it may be either delivered to the plaintiff's attorney; or, as is most usual, filed with the prothonotary.

FORMS.

No. 1. *Plea of Misnomer of Defendant's Christian Name.*

(—— Court.)

(—— Term.)

C. D. sued by the name of *E. D.* at the suit of *A. B.* } And *C. D.* against whom the said *A. B.* hath issued his said writ, and declared thereon by the name of *E. D.* comes and says, that he was baptized by the name of *C.* to wit, at*—— (venue) aforesaid, and by the Christian name of *C.* hath always since his baptism hitherto been called and known; without this, that the said *C. D.* now is, or ever was, called or known by the Christian name of *E.* as by the said writ and declaration thereon founded, is supposed: and this the said *C. D.* is ready to verify, wherefore he prays judgment of the said writ and declaration thereon founded, and that the same may be quashed, &c.

[*N. B.* Care must be taken to entitle this plea, as also the affidavit in its support, properly. Another point to be kept in view is, that no words such as "and the said," *Roberts v. Moon, 2 T. R. 487*, or by entitling the affidavit under the same names mentioned in the writ or declaration, shew that the defendant acknowledge that writ or declaration properly to relate to him.

* But venue is unnecessary, 7 T. R. 243.

ABATEMENT *by Death, &c.*; CASES.

5

And the whole name of the defendant must be stated in the plea. *Hawarth v. Spraggs*, 8 *T. R.* 515. See also *Lake v. Inwood*, 1 *Chit. R.* 705. n.]

No. 2. *Plea of Coverture of Defendant.*

(—— Court.) (—— Term.)
C. F. sued by the name of } And the said *C.* in her own proper
C. D. at the suit of } person comes and prays judgment of
A. B. } the said bill of the said *A. B.* because
she says, that at the time of the exhibiting of the said bill of the said *A. B.* she was, and still is, married to one *E. H.* who is still living, to wit, at *—— (venue) aforesaid: and this she is ready to verify, wherefore because the said *E. H.* is not named in the bill aforesaid, she prays judgment of the said bill, and that the same may be quashed, &c.

No. 3. *The Affidavit of the Truth of a Plea in Abatement.*

(—— Court.) *A. B.* plaintiff
and
C. D. sued by the name of
E. D. defendant.
C. D. of —— the defendant in this cause, maketh oath, and saith, that the plea hereunto annexed is true in substance and in fact.

ABATEMENT *of the Suit, by Death or other Circumstances affecting the Person.*

By 17 *Car. II. c. 8.* the death of either party between verdict and judgment, shall not be alleged for error, so as judgment be entered within two terms after such verdict. *Act of 17 Car. 2. c. 8.*

It is a ground for setting aside a verdict if plaintiff or defendant die before the assizes, (that is, before the commission-day,) but not if after. *Jacobs v. Miniconi*, 7 *T. R.* 31; and if the death happen before the day appointed for the sittings in term for which it appeared notice of trial had been given, the verdict will be set aside. *Taylor v. Harris*, 3 *B. & P.* 549.

When death
abates the suit,
and when not.

If money be paid to a stakeholder under a rule of court to abide the event of a trial in tort, and before the trial the suit abates by the defendant's death, the plaintiff not having obtained any previous verdict is not entitled to receive the money. *Dewell v. Moxon*, 5 *Taunt.* 603.

Though the plaintiff die after verdict for defendant, and before the day in banc, he shall be entitled to execution, if judgment shall have been signed within two terms, according to the statute, *Sid.* 385; but not without *scire facias*, *Earl v. Brown*, 1 *Wils.* 302. But if the plaintiff die after verdict for the defendant, and he do not enter up judgment within two terms thereafter, the court have no authority subsequently to permit it to be entered up, *nunc pro tunc*. *Copley v. Day*, 4 *Taunt.* 702. But where in an action for a libel the plaintiff died after interlocutory judgment and writ of enquiry executed, but before the next day in banc, it was held that final judgment could not be executed for the plaintiff for the damages assessed, the suit having abated by his death. *Ireland, clerk, v. Champneys*, 4 *Taunt.* 884.

* But venue is unnecessary, 7 *T. R.* 243.

ABATEMENT of Writ of Error; CASES.

After special verdict, and pending the discussion on motion in arrest of judgment, or for new trial, the death of either party does not abate the suit; and judgment may be entered at common law after his death, as of the term in which the *postea* was returnable: or judgment would otherwise have been given *nunc pro tunc*. See 1 *East*, 409, and *Tidd*, 940, and the numerous authorities cited.

Act of 8 & 9 W. 3.
c. 11, s. 6.

By stat. 8 & 9 W. III. c. 11. s. 6, it is in effect enacted, that in all actions to be commenced in any court of record, if the plaintiff or defendant die after interlocutory and before final judgment, the action *shall not abate*, if such action might have been originally prosecuted or maintained by or against the executors or administrators of the party dying; but the plaintiff, or if he be dead after such interlocutory judgment, his executors and administrators may have *scire facias* against defendant, if living after such interlocutory judgment, or if he died after, then against his executors or administrators, to shew cause why damages in such action should not be assessed and recovered by him or them.

S. 7. As to action surviving.

And by *sect. 7*, following, if there be two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but on suggestion, &c. See tit. JUDGMENT, SCIRE FACIAS, SUGGESTION, *post*.

When baron dies.

If in ejectment against baron and feme, baron die between the day of *Nisi Prius* and the day in banc, the action survives, and judgment shall be entered against her. *Rigley v. Lee and Wife*, *Cro. Jac.* 356. *S. C. Rol. Rep.* 14.

In case of marriage of feme.

If feme sole after verdict marry before day in banc, she shall have judgment. *Anon. Cro. Car.* 232.

A feme sole cannot abate her own writ by marriage, 2 *Rol.* 53; nor if she be sued and afterwards marry, is it any abatement of the writ. *King and Wife v. Jones*, *Ld. Raym.* 1525. *S. C. 2 Str.* 811.

If feme sole be sued in an inferior court, and pending writ marry, and afterwards remove the cause by *habeas corpus* and the plaintiff declare against her as feme sole, she may plead coverture in abatement; but it is said the court on the return of the *habeas corpus* will grant *procedendo*. *Hetherington v. Reynolds*, 1 *Salk.* 8. See tit. BANKRUPT, *post*.

ABATEMENT of Writ of Error. See tit. ERROR, WRIT OF, *post*.

In what cases it abates.

Death of plaintiff before assignment of errors abates writ of error: so if one of many plaintiffs dies. 11 *Co.* 135. 1 *Vent.* 34. *Pennoir v. Brace*, 1 *Salk.* 319; but see tit. ERROR, WRIT OF, *sect. IV. post*.

But in no case if defendant in error die. *S. C.* 1 *Ld. Ray.* 244. 1 *Vent.* 34. 2 *Bulstr.* 231. *Show.* 186.

But death of plaintiff after errors assigned, and joinder in error does not abate writ of error. 2 *Sel.* 406.

Where plaintiff in error dies before the writ of error in parliament was returned and certified, leave of the court must be obtained before issuing execution. *Ld. Kinnaird v. Lyal*, 7 *East*, 296.

Plaintiff in error discontinuing before defendant pleads, may have a new writ, but not after. *Imp.* 823.

ABBREVIATIONS. ABIDING, &c.; CASES; PR. DI. K. B.

7

From the case of *Pocklington v. Peck*, *Str.* 638, it should seem, that where plaintiff in error had pleaded to a *scire facias*, marriage of defendant in error, and that thereupon defendant had moved to quash the *sci. fa.* the plaintiff in error would not be allowed costs. Leave will be given to take out execution, if Chief Justice die. *Cramborne v. Quennel*, 1 *Bar.* 201. *Hayes v. Thornton*, *ib.*

Marriage of plaintiff in error abates writ of error. *Buller v. Pina*, 2 *Str.* 880. *Jenkins v. Bates*, *id.* 1015.

Bankruptcy does not abate error, *Kretchman v. Bayer* in error, 1 *T. R.* 463; nor prorogation, 1 *Lev.* 165. 2 *id.* 93. 1 *Mod.* 106. *S. C.* 1 *Vent.* 266. *S. P.*; nor dissolution of parliament. *Com. Dig.* tit. Parliament, (P. 2.) *Tidd*, 1208, 9. But see 2 *Crompt.* 391.

ABBREVIATIONS. See tit. ATTORNEY, sect. IV. *post*, where stat. 2 *G. II. c.* 28. s. 23. and 12 *G. II. c.* 13. ss. 5, 6. are abstracted.

ABIDING BY PLEA. A defendant who pleads a frivolous plea, or a plea merely for the purpose of delaying the suit; or who for the same purpose shall file a similar demurrer, may be compelled by rule in term time, or by judge's order in vacation, *Foster v. Snow*, 2 *Burr.* 781, either to abide by that plea, or by that demurrer, or to plead another plea peremptorily *on the morrow*; or if near the end of term, and in order to afford time for notice of trial, motion may be made in court for rule to abide or plead *instantly*; that is, within twenty-four hours after rule served, *Imp. B. R.* 340, who cites *Price v. Hodgson*, *E.* 35 *G. III.* provided that the regular time for pleading be expired.—*R. T.* 5 & 6 *G. II. (b).*

K. B.

The rule is of course.

If the order of the court be to plead *forthwith*, within a convenient time shall be intended. *P. R.* 372. *i. e.* twenty-four hours. *Imp. K. B. ubi sup.*

If the defendant, when ruled, do not abide, he can only plead the general issue. *Hare v. Lloyd*, 1 *T. R.* 693, but he may add a notice of set-off. *Id.* 694. n.

And after such rule, judgment cannot without application to the court, be signed as for want of a plea. *Draycott v. Pilkington*, 1 *Chit. R.* 565. n. *Duberley v. Phillips*, *id. ib. acc.*

The usage of the Court, in relation to this head, is very distinct; for in C. P. the plea, dilatory or not, must be abided by, *Imp. C. P.* 247; who cites *Cooper v. Mansfield*, *T.* 31 *G. III.*

C. P.

PRACTICAL DIRECTIONS.—K. B.

To obtain a rule for defendant to abide by his plea, or plead on the morrow, it is sufficient in term time to indorse the title of the cause on an instruction, paper, or brief—"To move that defendant may abide by his plea, or plead on the morrow." Counsel's hand, 10s. 6d. The clerk of the rules draws up the rule, 7s. Serve copy on, or leave same at the house of defendant's attorney.

If, on account of having time to give notice of trial, it be intended that defendant shall abide or plead instantly, the motion is made in court, and counsel hands up the instructions.

Apply in the evening at the clerk of the rules for rule, pay 7s. Serve copy as above.

If Judge's order obtained out of term, copy of same is served in like manner.

ACCEDAS AD CURIAM. ACCOUNT, *Action in.*

ACCEDAS AD CURIAM. An original writ, issuing out of Chancery, now of course; returnable in K. B. or C. P. for the removal of a replevin sued by plaintiff in court of any lord, other than the county court before the sheriff.

This writ is the same nearly as that of the *recordari facias loquelam*, and derives its title from the clause inserted in the *re. fa. lo.* "commanding the sheriff, that taking with him four discreet and lawful knights of his county, he go in his proper person to the court of the lord; and in that full court cause to be recorded the plaint, &c." *F. N. B.* [70.]

On this writ, when issued in *false judgment*, the sheriff must go in person to the lord's court, but knights are not necessary. *F. N. B.* [18.] *E.*

This writ should be returned under the sheriff's seal, and the seals of four suitors of the court; and it is a good return for the sheriff to say, that after the receipt of the writ, and before the return thereof, no court was holden; and also that he required the lord to hold his court, and he would not, so that he could not execute the same; and thereupon the justices shall award a *distringas* directed unto the sheriff, to distrain the lord to hold his court, and *sicut alias*, &c. *ib.* When the return is filed, the cause, it seems, cannot afterwards be remanded, *id.* [69.] *M.* (a); unless it were removed from a court of ancient demesne, *Id. Gilb. Rep.* 110, 111. The writ must bear date subsequently to the entry of the plaint in the lord's court. *F. N. B.* 71 *D.* *Gilb. Rep.* 118.

For the practice, see *RECORDARI FACIAS LOQUELAM*, *post.*

ACCORD AND SATISFACTION. Title of a plea to some actions, which plea, if proved, is sufficient to prevent the plaintiff from recovering; but though commonly pleaded, accord and satisfaction may be given in evidence on the general issue. 3 *Mod.* 18. *Gilb. C. P.* 63.

Acceptance of a less for a greater sum does not bar action for it. *Fitch v. Sutton*, 5 *East*, 230. See 11 *Id.* 390. But under a joint and several promissory note, cognovit by one, and levy under it of a part, does not discharge the rest. *Ayrey v. Davenport*, 2 *N. R.* 474.

Nor does accord before breach bar action on the covenant. *Kaye v. Waghorne*, 1 *Taunt.* 428.

But in tort against one of many, and compromise with him, the rest are discharged. *Dufresne v. Hutchinson*, 3 *Taunt.* 117.

ACCOUNT, *Action in.* This action has most unworthily fallen into disuse, it will not therefore be within the plan of this compilation to enter into details respecting it.

The action for money had and received, or, in cases of multifarious intricacy, the suit in equity has superseded the use of this action.—See *Com. Dig.* tit. *ACCOMPT.* *Bac. Ab.* tit. *ACCOUNT.* But it has lately been held at *Nisi Prius*, that an action of assumpsit cannot be maintained on a running account between a merchant and a broker, the proper remedy at law being an action of account. *Scott v. McIntosh*, 2 *Campb.* 238; but the difficulty of trying the cause constitutes no legal objection to this form of action. See 5 *Taunt.* 431, and *Com. Dig.* tit. *ACCOMPT.* (A. 1.)

AC ETIAM; STATUTE; CASES.

9

The judgment in this action is *quod computet* before a master or auditor, where the whole matters on both sides are examined, stated, and balanced. *Gilb. Law of Ev.* 192, and see *Lincoln v. Parr*, 2 *Keb.* 781. *Tri. per Pais*, 401.

AC ETIAM. *And also.* By stat. 13 *Car.* II. stat. 2. c. 2. s. 2. "No person arrested by any sheriff, &c. by force or colour of any "bailable writ, bill, or process issuing out of K. B. & C. P. or "either of them, *wherein the certainty and true cause of action is* "not expressed particularly, shall be compelled to give security "or enter into a bond with sureties for his appearance in any penalty or sum of money exceeding the sum of £40; but the sheriff, &c. shall let to bail every person by him arrested upon any "such writ, bill, or process, *wherein the certainty and true cause* "of action is not particularly expressed upon security, in the sum "of £40, and no more, for his appearance."

After the passing this statute therefore K. B., and soon afterwards C. P., in order to preserve a jurisdiction over civil suits, inserted in their bailable processes the clause of "*Ac etiam.*" These two words while the writ was in Latin, being the commencement of such clause expressive of the cause of action according to the statute. And see *RR. K. B.*, *H.* 2 *G.* II. *E.* 15 *G.* II.

For more of the learning upon this head, see 2 *Wms. Saund.* 52. n. (1.)

The sum for which defendant is to be held to bail must be inserted in the *ac etiam*, otherwise bail are exonerated. *Davison v. Frost*, 2 *East*, 305; but instead of the exact sum, the practice is to insert sufficient to cover general damages.

But the omission of a short statement of the cause of action in the *ac etiam* is an irregularity, and the defendant cannot be held to bail. *Munroe v. Roe*, 1 *Chit. R.* 171.

But in a bailable *capias* against two defendants, with a clause of *ac etiam* against one, the plaintiff may declare against that one solely, though both have been arrested under the writ, for the *ac etiam* points out the person intended to be proceeded against. *Kerval v. Fossett*, 1 *B. & M.* 147.

In some cases even when defendant is not to be held to bail the insertion of the *ac etiam* is necessary; as in an action on the lottery act the amount of the penalties sued for must be specified in the first process. *The King, q. t. v. Horne*, 4 *T. R.* 349. *Harria, q. t. v. Woolford*, 6 *T. R.* 617. Where the writ issued out upon a recognizance of bail *ac etiam* must be inserted, otherwise defendant or his attorney is not bound to accept declaration in debt upon such recognizance. *R. E.* 15 *G.* II.

Variance of declaration from *ac etiam* as to cause of action exonerates the bail. *Tetherington and another v. Golding*, 7 *T. R.* 80. *Wilks v. Adcock*, 8 *T. R.* 27. *De la Cour v. Read*, 2 *H. Bl.* 278. *Kerr v. Sheriff*, 2 *B. & P.* 358. But C. P. held that such variance where the sum sworn to was under the £40 did not exonerate the bail. *Lockwood v. Hill*, 1 *H. Bl.* 310, but the court will not set aside the proceedings for irregularity, *per Cur. M.* 43 *G.* III. See tit. BAIL, SPECIAL; BILL OF MIDDLESEX, CAPIAS, LATITAT, *post*.

FORMS.—K. B.

In case.

After the words "in a plea of trespass" in the bill of Middlesex, insert "and also to a bill of the said J. D. to be exhibited against the said R. R. for £—— upon promises according to the custom of the court of our said Lord the King before the King himself;" If a latitat say, "according to the custom of our court before us." A blank is left in the printed form of these writs, and no difficulty will occur in the filling it up.

In debt on bond.

And also to a bill of the said J. D. to be exhibited against the said R. R. for £—— debt, according, &c.

In debt on recognizance.

To be exhibited against, &c. *as above*, in a plea of debt on recognizance, according, &c.

In covenant.

For breach of covenant to the damage of the said J. D. for £——, according, &c.

In debt on statute.

For £—— in debt on statute, according, &c.

In detainue.

For detaining the deeds and writings (*or as the case may be* "goods and chattels") of the said J. D. to the value of £——, according, &c.

In trover.

For converting and disposing of the goods and chattels of the said J. D. to the value of £——, according, &c.

In trespass *de bonis asportatis*.

For taking and carrying away the goods and chattels of the said J. D. to his damage of £——, according, &c.

In trespass and assault.

For a certain trespass and assault committed by the said R. R. on the said J. D. to his damage of £——, according, &c.

In crim. con.

For assaulting and having criminal conversation with E. the wife of the said J. D. to his damage of £——, according, &c.

In assumpsit at the suit of executors.

And also to a bill of the said J. and B. as executors of the last will and testament of T. S. deceased, to be exhibited against the said R. R. for £—— upon promises, according, &c.

The like as administrators.

And also to a bill of the said J. and B. as administrators of all and singular the goods, chattels, and credits which were of T. S. deceased, at the time of his death, who died intestate, to be exhibited against the said R. R. for £—— upon promises, according, &c.

The like as assignees of a bankrupt.

And also to a bill of the said J. and B. as assignees of the estate and effects of T. S. a bankrupt, according to the force, form, and effect of the several statutes concerning bankrupts, to be exhibited against the said R. R. for £—— upon promises, according, &c.

For foreign money.

For £500, of lawful money of Great Britain, in debt, being the value of £—— of gold and silver currency of the province of Quebec in North America, according, &c.

FORMS.—C. P.

The form of inserting the *ac etiam* in the process varies in this court; but for expression of the causes of action the foregoing forms answer every purpose.

In the usual blank left in the printed form of the *capias* constantly used, after the words "and against our peace," insert the *ac etiam* as follows:

Ac etiam assumpsit.

And also that the said R. R. may answer the said J. D. according to the custom of our court of Common Bench, in a certain plea of trespass on the case, upon promises to the damage of the said J. D. of £——, and have there this writ, &c.

In covenant.

—plea of breach of covenant to the damage, &c.

In assault.

—plea of trespass and assault to the damage, &c.

ACKNOWLEDGMENT OF DEBT. See tit. LIMITATIONS.

Statutes of Limitation, post.

ACQUITTAL.—Former acquittal may be pleaded in bar.

ACTION. A remedial instrument of justice, whereby redress is *purposed to be* obtained for any wrong committed, or right withheld. 3 *Black.* 116, 117.

In K. B. the action is commenced by, 1. Bill. 2. Original Writ. 3. Bill against Prisoners. 4. Bill against Attorney or Officer of the Court, K. B. 5. Attachment of Privilege, K. B. 6. Bill against Members of Parliament.—*See these several Heads or Titles.*

K. B.

In C. P. The action is commenced by, 1. Original, and Capias founded upon Original. 2. Original and Summons; and Distress founded upon Original.—*See Quare Clausum-fregit.* 3. Bill against Attorney and Officer of the Court. See Attorney or such Officer by his Title, C. P. 4. Bill against Peers and Members of Parliament. 5. Attachment of Privilege, C. P.—*See these several Heads or Titles.*

C. P.

Having thus briefly referred to the modes in which actions may be instituted in each court, the different species of action will be next as briefly mentioned.

The action or suit is either

CRIMINAL; which is not within the scope of this Dictionary, or **CIVIL**; real; personal; mixed.

A real action is brought or instituted for the recovery of what the law calls "real property" such as land. A personal action is brought for the recovery of a specific chattel or its value; as money, or a horse, or for the recovery of personal recompence for a personal injury, as damages for an assault, slander, libel, &c. A mixed action is brought for the recovery of real property, and damages for withholding it.

The requisite Practical Information relating to each action will be found on reference to the particular head, as **ASSUMPSIT**, **DEBT**, **EJECTMENT**, **TRESPASS**, &c.

And it may be observed, that the court will not suffer questions to be agitated by agreement between the parties in an action for money had and received, in a case where such action does not lie by law. *Marshall v. Hopkins*, 15 *East*, 309.

For a table containing the time in which actions are limited to be brought—*See tit. LIMITATIONS OF ACTIONS, post.*

AD ADMITTENDUM CLERICUM. Writ of Admittendum Clericum. *See tit. QUARE IMPEDIT, post.*

ADDING PLEA OR PLEAS. The court will, on motion, give leave, on payment of costs, to add a plea after issue joined, though two terms have elapsed. *Waters v. Bovell*, 1 *Wils.* 223, and this rule is generally, though not always absolute in the first instance. 1 *Tidd*, 502.

K. B.

The court, though issues had been joined a year, gave leave, on payment of costs, to add avowries. *Brown v. James*, *Bar.* 362. In general, as in K. B. the rule is absolute in the first instance. But C. P. refused leave to add plea of Statute of Limitations. *Cox v. Rolt*, 2 *Wils.* 253, saying such plea excluded the merits.

C. P.

See tit. WITHDRAWING PLEAS, post.

PRACTICAL DIRECTIONS.

Give brief of instructions, with title cause, to counsel, 10s. 6d. to move that defendant be at liberty to add plea or pleas of ———

K. B.

ADDITION. AFFIDAVIT of Debt; CASES.

to that or those already pleaded, as the case may be; apply in the evening to the clerk of the rules; pay 6s. 6d.; serve copy on plaintiff's attorney or agent, and file added plea, as directed under tit. PLEA.

C. P.

Give similar brief to serjeant, 10s. 6d.; the secondary draws up rule, pay 6s. 6d.; serve copy as above, with the added plea delivered at the same time.

ADDITION. In actions by original writ the omission or mistake of the defendant's addition, that is, of his estate, degree, mystery, or place of abode, might be formerly pleaded in abatement, pursuant to 1 H. V. c. 5. but such a plea cannot now be pleaded. Gray and another v. Sidneff, 3 B. & P. 395. Deshons v. Head, 7 East, 383. But in outlawry, an error as to place of abode is yet under the statute fatal.

ADJOURNMENT-DAY in Error. A day appointed some days before the end of the term, at which matters left undone on the Affirmance Day, which see, are finished. 2 Tidd, 1224.

So called from its being a further day appointed by the Judge at the regular sittings, to try causes at *Nisi Prius*. See tit. ENTERING CAUSE FOR TRIAL—NOTICE OF TRIAL, *post*.

OF ESSOIGN. See tit. NON PROS.

OF THE EXECUTION OF WRIT OF INQUIRY. See tit. WRIT OF INQUIRY, *post*.

ADMINISTRATOR. The general law and practice, incidental to administrator, relates also to executor. See tit. EXECUTOR.

ADMINISTRATOR DE BONIS NON. See tit. SCIRE FACIAS, *post*.

ADMIRALTY COURT. See tit. LIMITATIONS. *Statutes of Limitations, post*.

ADMISSION AND RE-ADMISSION of an Attorney. See tit. ATTORNEY, *post*. ATTORNEY'S CERTIFICATE, *post*. CERTIFICATE, *post*.

ADMISSIONS. It frequently occurs in practice, that in order to save expence as to mere formal proofs, the attornies on each side consent to admit, reciprocally, certain facts in the cause without calling for proof of them. These are usually reduced to writing, and the solicitors shortly add somewhat to this effect: viz.

"We agree that the above facts shall on the trial of this cause
"be admitted, and taken as proved on each side,"

and signing two copies now called "admissions" in the cause, each solicitor takes one.

It is of the greatest importance that what may or may not be admitted without injury to the claim of either of the litigating parties, should be well considered; therefore the facts not to be disputed are often submitted to one or more of the counsel on either side, who may, probably, hold a brief on the trial.

Practical definition.

ADVOWSON. See tit. QUARE IMPEDIT, *post*.

AFFIDAVIT. A written statement on oath, or on affirmation, signed. *of Debt.* The law and practice of the affidavit of debt, required by stat. 12 G. I. c. 29. s. 2. to be filed previously to arrest, will be given in this place.

The deponent, or person making the affidavit of debt to hold a defendant to bail, *must* be legally competent to be a witness; but in *Horseley v. Somers*, *Bar.* 116, the court said, that though the plaintiff could not be a witness, he must not be stripped of his legal remedy to recover his just debts. *Davis and Carter's case*, 2 *Salk.* 461, and see 2 *Wils.* 225.

Deponent competent to be a witness.

It may be made by the *plaintiff* or his *wife*, or by any third person, who, if he swear positively to the debt being due, needs not state himself to be agent of, or connected with the plaintiff, *King v. Lord Turner*, 1 *Chit. R.* 58. And see *Brown v. Davis*, *Id.* 161. or by one or by several persons, *Pieters v. Luyties*, 1 *B. & P.* 1. But where plaintiff being abroad, his agent positively swears that defendant is indebted on a judgment, and in the affidavit subsequently alleges, that "said judgment is still in force and unpaid, as deponent believes," such allegation will not vitiate. *Bland v. Drake*, 1 *Chit. R.* 165. So affidavit that plaintiff is a transported felon, cannot be read when affidavit made by a competent agent. *Id. ib.* But when it appears *prima facie* to be made by a person incompetent to swear to the particular facts, *Qy.* Whether competency can be shewn on affidavit where the defendant has applied to be discharged on common bail? *Bolt v. Miller*, 2 *B. & P.* 420. But it has been decided that the means by which the deponent may know the fact need not appear on the face of the affidavit. *Andrioni v. Morgan*, 4 *Taunt.* 231. See also *Pieters v. Luyties*, 1 *B. & P.* 1. cited above. The true *place of abode*, and the addition of every person making the affidavit, must be inserted therein. *R. M. 15 Car. II.* *Jarrett v. Dillon*, 1 *East*, 18. *D'Argent v. Vivant*, *Id.* 330. *Polleri v. De Souza*, 4 *Taunt.* 154; and *abode*, means where deponent is usually to be found; as at an office where he is employed the greater part of the day. *Haslope v. Thorne*, 1 *M. & S.* 103. 1 *Chit. R.* 454. n. So, "of the city of London" is a good description. *Vaissier v. Alderson*, 3 *M. & S.* 165, but the rule *M. 15 Car. II.* *K. B.* which requires addition to the deponent's name, does not apply to *C. P.* *Anon.* 6 *Taunt.* 73; but it is advisable to state it. See 1 *East*, 18. 4 *Taunt.* 154.

By whom may be made.

Must contain residence and addition of deponent.

It may be made by a plaintiff residing in a foreign country, and if properly verified in this country, it is a sufficient foundation for a Judge's order to hold defendant to bail. *O'Mealy v. Newell*, 8 *East*, 364, and knowingly using a *false affidavit*, so made abroad, is punishable by indictment. *Id.* A foreigner just landed, may describe himself to be a resident in his own country. *Bouhet v. Kittoe*, 3 *East*, 154; or "late of such a prison," where a deponent is just discharged and lodges by permission in the prison at night, is a good description. *Sedley v. White*, 11 *East*, 528; but where the deponent has left one residence and obtained another, describing himself as lately of the first place, is bad. *Id. ib.*

May be made by a plaintiff residing abroad.

It must be made within a reasonable time previously to writ issuing. See *Collier v. Hague*, *Str.* 1270, where affidavit was made in 1744, and writ not issued till 1747—Held bad. And it must be made before the proper officer. See PRACTICAL DIRECTIONS, *subjoined, post.*

And within a reasonable time.

As to description
of the debtor.

Affidavit to hold to bail that *R. Sutton* is indebted to plaintiff for money paid, &c. to the use of *the said R. Jackson* :—Held well enough. Lord Ellenborough observing, that as the name Randle Jackson had not before occurred, there was no other word to satisfy *said* unless *Jackson* were rejected. *Hughes v. Sutton*, 3 *M. & S.* 178. And initials of defendant said to be sufficient, *C. P. Howell v. Coleman*, 2 *B. & P.* 466.

Must not be en-
titled.

It must not be entitled as in a cause. *R. T.* 37 *G. III.* 7 *T. R.* 454. *Hollis v. Brandon*, 1 *B. & P.* 36, and the above rule is recognized in *C. P.* in *Green v. Redshaw*, *ib.* 227.

And an affidavit not entitled in any court, and only with the words "by the court" written at the bottom of the jurat, is not sufficient. *Molling v. Poland*, 3 *M. & S.* 157. But although not entitled in the court, but purporting at the foot to have been sworn before J. Y. deputy filacer, the affidavit is sufficient. *Bland v. Drake*, 1 *Chit. R.* 163.

So if jurat signed by a judge of the court. *The King v. Hare*, 13 *East R.* 189.

Must be direct
and positive.
Exceptions.

It must be *direct and positive*, *Wheeler v. Copeland*, 5 *T. R.* 364. (save that in certain cases; where assignees, executors or administrators make affidavit of debt due to their respective estates; then, swearing "to belief" is sufficient) 1 *T. R.* 83, that the plaintiff has a subsisting cause of action; and the nature of such cause of action should be certainly and explicitly set out and described. See *Poller v. Souza*, 4 *Taunt.* 154. Yet affidavit by agent of person abroad swearing to belief of debt due on promissory notes, &c. sufficient to ground judge's order to hold to bail. *Allen v. Barry*, 1 *Chit. R.* 168.

The nature of
cause of action
must be certainly
set out. And see
post.

Where damage stipulated by agreement is the cause of action, the breach of the agreement must be stated in the affidavit. *Stinton v. Hughes*, 6 *T. R.* 13. *per Cur. H.* 41 *G. III.* *Willey v. Thornton*, 2 *East*, 409. *Edwards v. Williams*, 5 *Taunt.* 247. So condition of bond must be stated. *Armstrong v. Stratton*, 7 *Taunt.* 405, and must not be argumentative. *Wheeler v. Copeland*, 5 *T. R.* 364. *Mackenzie v. Mackenzie*, 1 *T. R.* 716. But the affidavit on bill of exchange need not state the character of the holder, whether as payee or indorsee. *Bradshaw v. Saddington*, 7 *East*, 94.

C. P. & K. B.

C. P. is not so strict in requiring certainty in the affidavit. *K. B.* requires both positiveness and certainty.

C. P.

In *C. P.*, ruled that circumstances are sufficient to be stated, without positively swearing to the debt. *Long v. Linch*, 2 *Bl.* 740. *S. C.* 3 *Wils.* 154. *Hobson v. Campbell*, 1 *H. Bl.* 247. See affidavit to hold to bail. Affidavit that defendant was indebted to plaintiff *in trover*—bad. *Hubbard v. Pacheco*, 1 *H. Bl.* 218.

In trover.

The affidavit to hold defendant to bail in trover must state the goods to have been in the defendant's possession. *Woolley v. Thomas*, 7 *T. R.* 456.

And if in trover for a bill of exchange, the same must be stated to be unpaid. *Clarke v. Cawthorne*, 7 *T. R.* 321.

See other cases respecting affidavits in trover. *Emerson v. Hawkins* and others, 1 *Wils.* 335. *Charter v. Jaques* and others, *Comp.* 529. See also tit. *TROVER*, *post.*

An affidavit on the lottery act must specify the nature of the offence, and must aver that the defendant has incurred the forfeiture, but it is unnecessary for the plaintiff to state that the penalty is due to him. *Davis v. Mazzinghi*, 1 *T. R.* 705. But the offence needs not to be stated circumstantially. *Ib.* *Watson v. Shaw*, 2 *T. R.* 650. And though the plaintiff is not bound to state the time when the act passed, the mis-stating it is fatal. *Watson v. Shaw*, *ut sup.*

On lottery act.

In the case of *White, q. t. v. Boot*, 2 *T. R.* 274, the court set aside the proceedings on statute 1. 25 *Ed.* III. because no affidavit had been filed agreeably to the statute 21 *Jac.* I. c. 24, but in *Leigh, q. t. v. Kent*, this case was thought not to be law, 3 *T. R.* 362, and it was ruled in *Balls, q. t. v. Atwood*, 1 *H. Bl.* 546, that the statute 21 *Jac.* I. requiring affidavit before action brought, did not apply to penal actions to be brought in superior courts.

And other penal acts.

These acts extend to Ireland.

The affidavit must be single, i. e. it must not contain two or more causes of complaint that cannot be joined in the same action, either at the suit of one, or of several plaintiffs. *Hussey v. Wilson*, 5 *T. R.* 254. The *Dean, &c. of Exeter v. Seagell*, 6 *T. R.* 688, or against one; *Crooke and another, executors, v. Davis*, 5 *Burr.* 2690, or several defendants, *Gibbey v. Lockyer*, *Doug.* 217. *Lewin, executor, &c. v. Smith the younger*, 4 *East*, 589. *Stables and another v. Ashley and others*, 1 *B. & P.* 49. And see *Goodwin v. Parry*, 4 *T. R.* 577.

Affidavit must be single.

In this court no affidavit supplemental to, or explanatory of the affidavit of debt can be received, *Cope and another v. Cooke*, *Doug.* 467. *Jacks v. Pemberton and another*, 5 *T. R.* 552. *Molling and others, assignees, &c. v. Buckholtz*, 2 *M. & S.* 563. *Fenton v. Ellis*, 6 *Taunt.* 192. And see 1 *J. B. Moore*, 110, nor can the defendant be admitted to make a counter affidavit, *Mackenzie v. Mackenzie*, 1 *T. R.* 716. For the court will not try the merits of a cause upon affidavit. *Emerson v. Hawkins and others*, 1 *Wils.* 395, but defendant may shew that he has been already holden to bail in this country for the same cause of action. *Imlay v. Ellefsen*, 2 *East*, 453, or that he is privileged from arrest. *Ib.*

K. B.

No supplemental

nor counter affidavit be admitted.

But K. B. exercises no discretion as to holding to bail. *Per Park, C. J.* 7 *Taunt.* 405.

This court admits a supplemental affidavit, *Garnham, executrix, v. Hammond*, 2 *B. & P.* 298. *Id.* 357, provided the first affidavit amount to an oath. *Reekes v. Groneman*, 2 *Wils.* 224, and even a contradictory affidavit, for the matter of bail is examinable. *Russell v. Gately*, *Bar.* 76. *S. P.* 61, 62, *Shaw v. Hawkins, ib.* 87. And ever a discretion exists in this court as to holding a party to bail. *Per Gibbs, Ld. Ch. J.* 7 *Taunt.* 405. But as to allowing a supplemental affidavit, &c. *ubi supra.*

C. P.

Admits supplemental and contradictory affidavit.

But in relation to the Bank Acts, C. P. does not allow of a supplementary affidavit. *Stewart v. Smith*, 1 *B. & P.* 132. n.

As to whether C. P. will, on affidavit of debt on contract, admit a contrary affidavit, seems doubtful; for the case of *Russell v. Gately, ubi supra*, was, where defendant had been held to bail for a malicious prosecution; though in *Shaw v. Hawkins, ubi supra*, the court held the matter of bail to be discretionary.

Cause of action
must be well stat-
ed in affidavit.

Cases upon ill
statement.

It has been seen before that the affidavit *must* be certain, clear, and positive. Many cases have occurred where defendant has been discharged on filing common bail, or on entering common appearance, for want of that precision in the statement of the cause of action, which the practice of the court requires. Some of the cases to this point are subjoined.

On comparing the declaration with the affidavit to hold to bail, and it appearing that the instrument declared on was not a bill of exchange or order, as alleged in the affidavit, common appearance was ordered, *Wilks v. Adcock*, 8 *T. R.* 27.

The affidavit stated a debt due on bond, "as thereby may appear."—Defendant discharged on filing common bail, *Heathcote v. Gosling*, *Str.* 1157.

Also, in a sum of money, "as appears by agreement, bearing date, &c." *Jennings v. Martin*, 3 *Bur.* 1447.

Also, "as appears by bill of exchange." *Rollin v. Mills*, 1 *Wils.* 279. And it must also shew that the bill was due. *Holcombe v. Lambkin*, 2 *M. & S.* 475. *Machu v. Frazer*, 7 *Taunt.* 171. *S. P. Edwards v. Dick*, 3 *B. & A.* 405. In which last case, *Davison v. March*, 1 *New. Rep.* 157, was declared to be overruled. And "bill of exchange or order," is sufficient. *Wilks v. Adcock*, 8 *T. R.* 27. And see *Lamb v. Newcomb*, 2 *Brod. & Bing.* 345.

Also, "that defendant is indebted to plaintiff in £—, as indorsee of a promissory note made by defendant," without stating the day of the note, or that it was payable on demand, or that it was due or payable at a day then past. *Jackson v. Yate*, 2 *M. & S.* 148. *Edwards v. Dick*, 3 *B. & A.* 495. *acc.* And see *Elastone v. Mortlake*, 1 *Chit. R.* 648. *Sands v. Grattain*, 4 *J. B. Moore*, 18. And where bill is payable to a third person, affidavit need not state the relation between the plaintiff and him. *Id. ib.* And see *Warmesley v. Macey*, 2 *Brod. & Bing.* 338. So, where affidavit of debt stated that the defendant was indebted to the plaintiff on promissory notes of the defendant, without stating how the plaintiff became entitled to recover upon them, is defective. *Balbi v. Batley*, 1 *Marsh.* 424. *S. C.* 6 *Taunt.* 25.* So also where the plaintiff who was indorsee of a bill of exchange did not state the character in which the defendant became liable to the plaintiff. *Humphries v. Williams*, 2 *Marsh.* 231. *S. C.* 6 *Taunt.* 531. But in *Machu v. Frazer* the necessity of stating the plaintiff's relation to the bill appears to have been doubted. 2 *Marsh.* 483. 7 *Taunt.* 171. *S. C.*; and see *Bradshaw v. Saddington*, 7 *East R.* 94. Also *Warmesley v. Macey*, *ubi supra*. Where in an affidavit of debt upon a money bond, the plaintiff, after stating the penalty, omitted to state for what sum the bond was conditioned. *Bosanquet and others v. Fillis*, 4 *M. & S.* 330, for *non constat*, but that the condition might be other than for the payment of money. But where the defendant was stated to be indebted to the plaintiff in the sum for principal and interest due on a bond, the affidavit was held sufficient. *Byland and Wife v. King*, 1 *J. B.*

* The case, as there reported seems correct, but the placitum is mistakenly deduced.

Moore, 24. In this case the sum sworn exceeded the penalty of the bond. See S. C. 7 *Taunt.* 275.

Stating that *R. M.* was justly and truly indebted unto the said *J. W.* in, &c. as the acceptor of a certain bill of exchange, bearing date, &c. "drawn by the said *J. W.* for a valuable consideration, on and accepted by the said *R. M.* payable two months after the date thereof, and due at a day now past:"—Held, to contain a sufficient description of the debt. *Warmesley v. Macey*, 5 *J. B. Moore*, 52, 168. 2 *Brod. & Bing.* 338. S. C.

So, affidavits to hold to bail, one by *A. B.* stating *C. D.* to be "justly and truly indebted to this deponent," in a certain sum, "as indorsee" of bills of exchange, "drawn by *E. F.* upon and accepted by *C. D.* payable to the order of the said *E. F.* at a certain day now past, and indorsed to this deponent." The other by *A. B.* stating *G. H.* to be "justly and truly indebted to this deponent," in a certain sum, "as indorsee of a certain bill of exchange drawn by *E. F.* upon and accepted by the said *G. H.* payable to the order of the said *E. F.* at a certain day now past:—Held, to contain a sufficiently certain description of the respective debts of *C. D.* and *G. H.* *Lamb v. Newcomb. Same v. Edwards*, 5 *J. B. Moore*, 14. 2 *Brod. & Bing.* 343. S. C.

Also, in a sum of money, "according to the bill delivered by plaintiff to defendant." *Williams, one, &c. v. Jackson*, 3 *T. R.* 575.

Or, "as appears by the master's allocatur." *Powel v. Portherch*, 2 *T. R.* 55.

Or, for interest money, "under and by virtue of an agreement." *Brook and others, assignees, &c. v. Trist*, 10 *East*, 358. And it seems that whenever the defendant is stated to be indebted under an agreement, it must be set out. See 2 *East*, 409.

In affidavit for goods sold and delivered, not stating "by plaintiff to defendant"—held bad. *Perks v. Severn*, 7 *East*, 194. *Cathrow v. Hagger*, 8 *East*, 106. *Taylor v. Forbes*, 11 *East*, 315. *Young v. Gattier*, 2 *M. & S.* 603. *Bell v. Thrupp*, 1 *Chit. R.* 331. See also *Feron v. Ellis*, 1 *Marsh.* 534. 6 *Taunt.* 192. S. C. Yet "for the hire of divers carriages of the plaintiff," without saying that they were hired of the plaintiff, was held sufficient. *Brown v. Garnier*, 2 *Marsh.* 83. 6 *Taunt.* 389. S. C.

So for damages awarded, and for costs and expences taxed and allowed. *Jenkins v. Law*, 1 *B. & P.* 365.

And now an affidavit of debt for goods bargained and sold must also state that they were delivered. *Hopkins v. Vaughan*, 12 *East*, 398, and sold, &c. for defendant instead of to defendant, is bad. *Bell v. Thrupp*, 2 *B. & A.* 596.

And work done for defendant, and at his request, is necessary. 1 *Chit. R.* 331.

And after stating circumstances under which the debt arose, concluding, "by reason whereof the defendant stands indebted," is bad. *Fowler v. Morton*, 2 *B. & P.* 48.

So, on affidavit of debt against surety on arbitration bond, it not appearing how the defendant became indebted, or that the money awarded to be paid by, had been demanded of the prin-

AFFIDAVIT of Debt; As to Bank Acts; CASES.

cipal, if required by the award. *Armstrong v. Stratton*, 1 *J. B. Moore*, 110. 7 *Taunt.* 405. S. C.

But where affidavit stated the defendant to be indebted to plaintiff "for money had and received on account of plaintiff." K. B. held it sufficient without adding "received by the defendant." *Coppinger v. Beaton*, 8 *T. R.* 338. So also for wages due to the plaintiff for his services on board the defendant's ship, without adding "from the defendant." *Symons v. Andrews*, 1 *Marsh.* 317.

So in affidavit to hold to bail for money paid to the use of the defendant, it is unnecessary to state that it was at the request of the defendant. *Hulton v. Eyre*, 1 *Marsh.* 315. 5 *Taunt.* 704. S. C. but names transposed. See also *Brown v. Garnier*, 6 *Taunt.* 389. And where the affidavit stated the money to be due for work and labour as the defendant's servant. *Bliss v. Atkins*, 1 *Marsh.* 317.

The courts less rigorous in certain cases.

In the following cases, for obvious reasons, the oath is less rigorous.

Assignee, executor, administrator, may swear less positively; "as he believes," held sufficient. *Loveland v. Bassett*, 1 *Wils.* 232. *Sheldon, executor, v. Baker*, 1 *T. R.* 83, but where the deponent not swearing to his own belief of the conversion in trover, but only to the fact appearing by certain letters, &c. "as he believes," the court discharged the defendant on common bail. *Molling and others, assignees, &c. v. Burkholz*, 2 *M. & S.* 563.

Executor swore, "as appears by books of testator,"—held sufficient. *Walrond v. Fransham*, *Str.* 1219. But "deponent believes it to be true," necessary. *Garnham v. Hammond*, 2 *B. & P.* 291. And see *Rowney v. Dean*, 1 *Price*, 401. And the affidavit must negative that between the time of an assignment having been made, and that of making the affidavit, the debt had been satisfied. *Mann v. Sheriff*, 2 *B. & P.* 355. And assignee may so swear. *Swaine, assignee, &c. v. Crammond*, 4 *T. R.* 176. But clerk to bankrupt must add his belief that the debt is due. *Lowe v. Forley*, 1 *Chit. R.* 92.

But persons in such characters must swear positively as to all facts within their own knowledge. *Creswell v. Lovell et al.* 8 *T. R.* 418.

Bank Acts as to tender of notes.

By 37 *G. III. c. 45. s. 9.* 37 *G. III. c. 91. s. 8.* 38 *G. III. c. 1. s. 8.* 43 *G. III. c. 18.* called the Bank Acts, the affidavit to hold to bail must state that "no offer has been made to pay the sum" "sworn to in notes of the Governor and Company of the Bank of England, expressed to be payable on demand, (fractional parts "of the sum of 20s. only excepted)" and these acts extend to affidavits made in Ireland to be used in this country. *Nesbitt v. Pym*, 7 *T. R.* 376. n. *Stewart v. Smith*, 1 *B. & P.* 192. n.

These acts extend to Ireland.

But these acts are repealed.

As the Bank restriction acts have lately been repealed, advertising to the numerous cases which have been decided upon them would be nugatory.

What shall be deemed waiver of objection to affidavit.

Defendant waives objection to affidavit, by voluntarily signing bail bond. *Norton v. Danvers*, 7 *T. R.* 375. Or by not taking advantage of it in the first instance. *D'Argent v. Vivant*, 1 *East*, 334. And see *Knight v. Dorsey*, 2 *J. B. Moore*, 305.

Also, by pleading. *Levy v. Dupont*, 1 T. R. 376. n.

Also, by allowing judgment to go by default, notice of enquiry having been given. *Desborough v. Copinger*, 8 T. R. 77.

Also, by perfecting bail above. *Chapman v. Snow*, 1 B. & P. 132. *Jones v. Price*, 1 East, 81. S. P.

Also, by putting in bail above. *Dalton v. Barnes*, 1 M. & S. 230. *Shawman v. Whalley*, 6 Taunt. 185.

Also, by voluntarily submitting to the process, by which the defendant shall be brought into court. *D'Argent v. Vivant*, 1 East, 330.

PRACTICAL DIRECTIONS.

The affidavit of debt must be engrossed on a 2s. 6d. stamp, and signed K. B. & C. P. by the party or parties making it. If deponent be unable to write, he must make his mark; and this must be noticed in the jurat. See FORMS, post.

A Quaker may affirm that affidavit is true; also to be noticed in the jurat. See FORMS, post.

Affidavit remains in force one year.

The affidavit may be sworn or affirmed before a judge of the court, or before the officer issuing the writ in town; or before a judge on circuit, or commissioner for taking affidavits, proper to and appointed by the court, pursuant to the stat. 29 Car. II. c. 5. in the country. Extended to the Isle of Man, 6 G. III. c. 50. s. 2; though such commissioner be the attorney for the plaintiff. R. G. E. 15 G. II.

An affidavit sworn at the bill of Middlesex office, cannot, by office copy or otherwise, be used to prove the suing a special *capias*. *Dalton v. Barnes*, 1 M. & S. 230; but putting in special bail, waives the irregularity. *Id. ib.*

The oath or affirmation is 1s. if in office hours; 2s. if otherwise.

Statute 55 G. III. c. 157, authorizes the superior courts of law and equity in Ireland, to grant commissions for taking affidavits in any part of Great Britain. Commission stamp for England, 12s. Stat. 55 G. III. c. 184. Sched. Part II. s. 3.

Where made out of the king's dominions, the affidavit must state all the requisites for holding to bail in England. Per Lord Kenyon, L.C.J. T. 36 G. III. 1 Tidd, 203. 7 T. R. 251 *Haydon v. Federici*, E. 38 G. III. K. B. 1 Tidd, 203, 4. And see *Omealy v. Newell*, 8 East, 364.

Seemle, that affidavit of debt made before a British Vice Consul is sufficient to hold the defendant to bail. *Thurlt v. Faber*, 1 Chit. R. 463. 721.

As the affidavit made in this country to verify the hand-writing of the British Vice Consul before whom the affidavit of debt was made abroad, must contain the deponent's addition; and defendant's obtaining a *habeas corpus*, does not cure the omission. *Id. ib.*

By R. G. M. 37 G. III. the jurat of every affidavit made by two or more deponents must contain the names of the several persons making it; and no affidavit will be permitted to be read, in the jurat of which there shall appear any interlineation or erasure.

The affidavit must be filed before or at the time of issuing the bailable writ. *Reeks v. Groneman*, 2 Wils. 225. though doubted 1 Sel. 113.

The nature of the writ will point out the proper officer before whom, exclusive of the judges, the affidavit may be sworn, and with whom it is to be filed in town.

K. B.

AFFIDAVIT of Debt; FORMS; As to Monies, &c.

C. P.

The proper officer before whom, exclusive of the judges, the affidavit may be sworn, is the filazer for the county into which the writ issues. See TABLE OF OFFICES PREFIXED.

How if made in Scotland or Ireland.

If the affidavit be to be made in Scotland* or Ireland, the person making the affidavit may go before a magistrate competent to administer an oath in either of those countries, and make the affidavit in the presence of another person, who may be shortly going to London; which person, upon his arrival in London, must also make affidavit "that the affidavit of debt was so made by the person whose affidavit it appears to be, that the hand-writing subscribed thereto is the hand-writing of such person; that the said affidavit was made and taken before a magistrate, who deponent believes had competent authority to administer an oath; and that the hand-writing subscribed to said affidavit, is the hand-writing of such magistrate." On these affidavits a Judge makes an order to hold to bail. This practice recognized, *Turnbull v. Moreton*, 1 Chit. R. 721.

And it has been determined, that where an affidavit of debt contained no place in the jurat, but purported to be sworn before the Chief Justice of the King's Bench of Ireland and to be signed by him, and such signature was verified by affidavit here, it was a sufficient foundation for arresting the defendant under a judge's order on *mesne process*. *French v. Bellew and another*, 1 M. & S. 302.

FORMS.†

[Court.]

Affidavit of debt for money lent.

John Doe, of _____ printer, maketh oath and saith, that Richard Roe is truly and justly indebted unto this deponent in the sum of £_____ for money lent and advanced by this deponent to the said Richard Roe and at his request.

Sworn at the _____ (Signed) JOHN DOE.

Jurat where deponent illiterate.

By R. G. 31 G. III. If the affidavit be made before a commissioner of the court by any person who from his or her signature appears to be illiterate, the commissioner taking such affidavit shall certify or state in the jurat "that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same, and also that the said party wrote his or her signature in the presence of the commissioner taking the said affidavit."

Affidavit of a quaker.

If the affidavit be to be made by a Quaker, say, "Jno. Styles, of _____, stationer, being one of the people called Quakers, solemnly affirms, that Richard Styles is justly and truly indebted unto this affirmant" using the word "affirmant" instead of deponent throughout, and also saying "and this affirmant further affirms," &c.

Jurat where quaker affirms.

The jurat must also notice the fact of the affidavit being "affirmed" instead of "sworn."

Jurat where interpreter necessary.

Also, if the deponent be ignorant of the English language, he is sworn by an interpreter, and the jurat mentions that fact thus, "Sworn at _____, the _____ day of _____, by _____ being first read over and explained to him by _____, (the interpreter), in the _____ language, who was first sworn duly to interpret the same, before _____."

* Mr. Impey, P. C. P., says, but cites no authority, that an affidavit of a person being living, if sworn in Scotland, should be sworn before a lord of session, and not a justice of peace there, or it will not be received here. *Tamen query*. If the plaintiff reside, e. g. at

Caithness, several hundred miles from a residence of a lord of session.

† Forms of affidavits, not subjoined to this article, will be found under their proper head of practice; as MOTION, SERVICE, &c.

Jane Doe, wife of *John Doe*, of ———, or, *Thomas Styles*, of ———, servant to *John Doe*, of ———, maketh oath and saith, that *Richard Roe* is justly and truly indebted to the said *John Doe* in the sum of £———, for money lent and advanced by the said *Jno. Doe* to the said *Richard Roe*, at his request.

N.B. Mr. Impey doubts the validity of an affidavit by wife or servant, but Mr. Tidd admits a precedent without observation.

For money paid, laid out, and expended by this deponent for the said *R. R.* at his request. For money paid.

For money had and received by the said *R. R.* to and for the use of the said deponent. For money had and received.

The three last Forms are sometimes incorporated in one, thus,

For money lent and advanced, and paid, laid out, and expended by this deponent to and for the use of the said *R. R.* and at his request, and for other money had and received by the said *R. R.* to and for the use of this deponent. For money lent, laid out, and had and received,

For money due and payable from the said *R. R.* to this deponent for interest upon and for the forbearance of divers large sums of money lent and advanced by this deponent to the said *R. R.* (or due and payable from the said *R. R.* to this deponent) and by this deponent forborne for divers long spaces of time now elapsed, at the request of the said *R. R.* For the interest of money.

For money due from the said *R. R.* to this deponent upon the balance of an account stated and settled between him and the said *R. R.* For money due on an account stated.

J. D. of ———, maketh oath and saith that *R. R.* is justly and truly indebted to this deponent and *T. S.* executors of the last will and testament of *S. S.* deceased, which said *S. S.* in his life-time, and at the time of his death, was executor of the last will and testament of *T. T.* deceased, in the sum of £———, for money had and received by the said *R. R.* to and for the use of the said *T. T.* in his life-time, as appears by the books of the said *T. T.* and as this deponent verily believes. By one executor of an executor for money lent by the first testator.

——— in the sum of £——— on a bill of exchange, drawn by one *T. S.* and accepted by the said *R. R.* payable to this deponent or order, (as the case may be) at a day now past. Payee of a bill of exchange against acceptor,

——— in the sum of £——— on a bill of exchange, drawn by the said *R. R.* on one *T. S.* and payable to this deponent or order (as the case may be) at a day now past. Payee against drawer.

——— in the sum of £——— on a bill of exchange, drawn by the said *R. R.* on one *T. S.* payable to his own order at a day now past, and by the said *Richard Roe* indorsed to this deponent. Indorsee against drawer.

——— in the sum of £——— as indorsee of a bill of exchange, indorsed by the said *R. R.* to this deponent, and payable at a day now past, &c. Indorsee against indorser.

N.B. It may so happen that the bill of exchange in the hands of a bona fide indorsee hath been refused acceptance; in which case, although it seems he may hold the indorsee to bail, the words "payable at a day now past," must be omitted, and perhaps it will be as well for the deponent to state the fact of the refusal to accept.

——— in the sum of £——— on a promissory note, made by the said *R. R.* payable to this deponent or order, at a day now past. Payee against drawer of a promissory note.

AFFIDAVIT of Debt; Forms; As to Monies, &c.

Indorsee against drawer.

_____ in the sum of £_____ on a promissory note, made by the said *R. R.* payable to one *T. S.* or order, (*or as the case may be*) at a day now past, and by him indorsed to this deponent.

Indorser against indorser.

_____ in the sum of £_____ as indorsee of a promissory note, made by one *T. S.* and by the said *R. R.* indorsed to this deponent, payable at a day now past.

Payee against drawer where part has been paid.

_____ in the sum of £_____ upon a promissory note, made by the said *R. R.* payable to this deponent or order, (*as the case may be*) for £_____ at a day now past.

On an insurance policy.

_____ upon and by virtue of a certain writing or policy of assurance, whereby this deponent caused himself to be insured (*here follow the terms or words of the policy*)—and which said writing or policy of assurance was and is underwritten by the said *R. R.* for the said sum of £_____. And the said *J. D.* further saith that the said (*insert ship or goods or whatever was assured, and also how the same was or is lost*). And that a total loss of one hundred per cent. on the said policy has been since adjusted and signed by the said *R. R.*

For freight on a charter-party.

_____ upon and by virtue of a certain charter-party of affreightment, bearing date _____ for and on account of the freight and hire of a certain ship or vessel called the _____ let to hire by this deponent to the said *R. R.* and by him taken and used for and during (*as the case may be*).

As obligee of a bond.

_____ in the sum of £_____ for principal and interest due on a bond bearing date the _____ day of _____ in the year of our Lord _____ (*or last past, as the case may be*) and made and entered into by the said *R. R.* to this deponent in the penal sum of £_____ conditioned for the payment of the sum of £_____ and interest for the same at a day now past.

By assignee where obligee has assigned his interest in the bond.

_____ is justly and truly indebted to *Thomas Styles* in trust for this deponent in the sum of £_____ for principal and interest due on a bond bearing date the _____ day of _____, in the year, &c. and made and entered into by the said *R. R.* to the said *T. S.* in the penal sum of £_____, &c. and the monies due and to grow due on which bond, and also such bond *so far as it lawfully might*, have been since duly assigned by the said *T. S.* to this deponent*.

On an annuity secured by bond payable during the life of the grantee.

_____ for the arrears of a certain annuity due to this deponent under and by virtue of a bond bearing date the _____ and made and entered into by the said *R. R.* to this deponent, in the penal sum of £_____ conditioned for the payment of the sum of £_____

* There seems, even according to the most accurate compilations of precedents, some confusion of law and of fact in the form of an affidavit by an assignee, where the obligee has assigned his interest in a bond.

A bond being a *chose in action*, cannot be assigned so as to enable the assignee to sue in his own name thereon; yet, following the precedents to be found in those compilations, the assignee of the interest in the bond will be made to swear to the assignment of an instrument which the law has determined to be unassignable.

The above and following precedents are, with great deference, calculated to

obviate this seeming collision of the law with the oath. As the assignment of a bond, therefore, can convey no title to sue thereon; but only the mere possession of the paper and wax, *Co. Lit. 232*, so it may be presumed that the right of the assignee to sue on the bond should not appear to be derived through an assignment incapable of conferring that right in law, however it may, and does, in equity.

The words in these precedents, intended by the compiler to reconcile the terms of the oath with the law, are in *italic*; being rejected, the usual form will remain.

a year to this deponent during the natural life of this deponent (or as the case may be)*.

J. D. of ———, one of the assignees of the estate and effects of *T. S.* a bankrupt, maketh oath and saith, that *R. R.* did by his bond, bearing date the ——— become bound to *T. T.* in the penal sum of £——— conditioned for the payment of the sum of £——— and interest, at a certain day therein named, and now past; and this deponent further saith, that the said *T. T.* did by a certain indenture, bearing date the ———, for a good and valuable consideration assign, transfer, and set over all his right and interest of, in and to the said bond, together with the said bond itself, (so far as he lawfully might) and all monies due and to grow due thereon to the said *T. S.* who hath since become bankrupt, and that this deponent, and *M. M.* are assignees of the estate and effects of the said *T. S.*; and this deponent further saith, that the said *R. R.* hath not paid the said sum of money mentioned in the condition of the said bond, either to this deponent, or, as this deponent believes, to the said *T. T.* or to the said *T. S.* or to the said *M. M.*; and this deponent further saith, that there is now due and owing on the said bond, by and under the condition thereof, the sum of £——— for principal and interest, in which sum of £——— the said *R. R.* is now justly and truly indebted unto this deponent and the said *M. M.* as assignees as aforesaid.

By an assignee of a bankrupt where the money due on a bond had been assigned to the bankrupt.

——— on and by virtue of a certain instrument in writing made according to the laws of Scotland, and there called a bond.

On a Scotch bond.

——— upon and by virtue of a judgment recovered by this deponent in this honorable court (or as the case may be) against the said *R. R.* as of ——— term last past, and also in the further sum of £——— for his costs taxed thereon, &c.

On a judgment.

——— upon and by virtue of a judgment of this honorable court (or as the case may be) for the sum of £———, recovered by the said *T. S.* in his life-time against the said *R. R.* which said judgment is still in force and unsatisfied, as appears by the record of the said judgment, and as this deponent verily believes.

By an executor on a judgment recovered by his testator.

J. D. of ———, maketh oath and saith, that *R. R.* is justly and truly indebted unto *T. S.* and *S. S.* as executors of the last will and testament of ——— deceased, in trust for this deponent, in the sum of £———, for principal and interest due on a certain indenture of mortgage, bearing date the ———, and made between the said *R. R.* of the one part, and the said ——— in his life-time, of the other part, whereby the said *R. R.* covenanted and agreed to pay the sum of £———, and interest, (whereof the said sum of £——— is part) to the said ———, at a certain time therein mentioned, and now past, and saith that the money due on such mortgage, as well as the said mortgage so far as the same lawfully might, were duly assigned by the said ——— in his life-time to this deponent. [See note, page 22, ante.]

By assignee of a mortgage to a testator since deceased; that money is due to the executors in trust for deponent.

FOR SERVICES AND WORKS.

——— for wages due and payable from the said *R. R.* for the service of this deponent, done and performed as the hired servant of the said *R. R.* and on his retainer.

For wages,

* If the annuity be payable during the life of another person, it will be requisite to state that he is living.

AFFIDAVIT of Debt; FORMS; As to Services, &c.; Goods, &c.

By baron and
feme for work,
&c. before feme's
marriage.

Elizabeth, the wife of *J. D.* of ———, maketh oath and saith, that *R. R.* is justly and truly indebted to the said *J. D.* and *this deponent**, in the sum of £———, for work and labour done and performed, and for materials and necessary things found and provided by this deponent before her intermarriage with the said *J. D.* for the said *R. R.* and at his request.

For work, &c. by
plaintiff.

——— for work and labour done and performed by this deponent for the said *R. R.* at his request.

By plaintiff and
servants.

——— for work and labour done and performed by this deponent and his servants, and with his horses, carts and carriages for the said *R. R.* and at his request.

For work, &c.
and materials.

——— for work and labour done and performed, and materials found and provided by this deponent for the said *R. R.* and at his request.

For work, &c.
as an architect
and surveyor.

——— for work and labour done and performed by this deponent as an architect and surveyor in and about the drawing of divers plans, elevations, and sections of buildings, and making estimates of the costs and charges to attend the erection thereof, and for the superintending and surveying the erection of certain buildings, and in and about the admeasurement and valuation of certain works, and the payment of certain workmens' bills for the said *R. R.* and in and about other the business of the said *R. R.* and at his request.

As a surgeon and
apothecary.

——— for work and labour, care, diligence, and attendance done, performed, and bestowed by this deponent as a surgeon and apothecary, for the said *R. R.* and at his request, in and about the healing and curing of the said *R. R.* (*and divers other persons*) of divers diseases, disorders, and maladies, and under which they had respectively laboured and languished, and for divers medicines and other necessary things found and provided, administered, delivered and applied by this deponent on those occasions for the said *R. R.* and at his like request.

As an attorney
and solicitor.

——— for work and labour, care, diligence, and attendance done, performed, and bestowed by this deponent as the attorney and solicitor of and for the said *R. R.* and on his retainer in and about the prosecuting and defending of divers causes, suits, and businesses (*if for "prosecuting," or "defending" one suit only; state the fact to be as it really is*), for the said *R. R.* and for certain fees due and of right payable to this deponent in respect thereof. And, &c.

If, for convey-
ancing.

——— *after "bestowed by this deponent," as above, say* "in and about the drawing, writing, and engrossing of divers deeds and writings for the said *R. R.* and in and about other the business of the said *R. R.* and at his request. And for money laid out, expended, and paid for the said *R. R.* by this deponent in respect thereof, and at his like request.

FOR GOODS SOLD, HIRE, &c.

Goods sold, &c.

——— for goods (*a horse, cow, &c. as the fact may be*) sold and delivered by this deponent to the said *R. R.* and at his request.

Where bargained
and sold to one,
and delivered to
a third person.

——— for goods bargained and sold by this deponent to the said *R. R.* and under and by virtue of that bargain and sale delivered to one *T. S.* at the special instance and request of the said *R. R.*

Where husband
held to bail for
debt due from
wife while sole.

A. B. of ——— maketh oath and saith, that *C. D.* and *E. F.* his wife are justly and truly indebted unto this deponent, in the sum of £——— for goods sold and delivered by this deponent to the said *E. F.* and at her request before her intermarriage with the said *C. D.*

* Qy. The propriety of the words in italic.

J. D. of _____ maketh oath and saith, that *R. R.* is justly and truly indebted to this deponent and to *T. S.* and *J. S.* in the sum of £_____ for goods sold and delivered by this deponent and the said *T. S.* and *J. S.* to the said *R. R.* and at his request.

By one of several partners for goods sold, &c.

_____ for goods sold and delivered by this deponent and one *T. S.* in his life-time, now deceased, and whom this deponent hath survived, to the said *R. R.* and at his request.

By a surviving partner for goods sold, &c.

J. D. of _____ maketh oath and saith, that *R. R.* is justly and truly indebted unto this deponent and to one *T. S.* as assignees of the estate and effects of *S. S.* a bankrupt, in the sum of £_____ for goods sold and delivered by the said *S. S.* before he came bankrupt, to the said *R. R.* and at his request, as appears by the books of account of the said *S. S.* in the possession of this deponent and the said *T. S.* and as he this deponent verily believes.

By assignees for goods sold by the bankrupt.

E. D. of _____ widow, executrix of the last will and testament of *J. D.* deceased, maketh oath and saith, that *R. R.* is justly and truly indebted unto this deponent, as executrix as aforesaid, in the sum of £_____ for goods sold and delivered by the said *J. D.* in his life-time, to the said *R. R.* as appears by the books of the said *J. D.* and as this deponent verily believes.

By an executrix for goods sold by her testator.

_____ for meat, drink, washing, lodging, and other necessities, found and provided by this deponent for the said *R. R.* and at his request.

For necessities, &c.

_____ for horse-meat, stabling, care and attendance found, provided, and bestowed by this deponent for and in and about the feeding and keeping of divers horses, mares, and geldings (*or horse or mare, or gelding, as the case may be*) for the said *R. R.* at his request*.

For horse meat, &c.

_____ for the agisting, depasturing, and keeping of divers cattle by this deponent for the said *R. R.* and at his request.

For agistment.

_____ for the use and hire of divers horses, mares, and geldings, and of divers chaises and other carriages let to hire and delivered by this deponent to the said *R. R.* and at his request.

For hire of horses, &c.

_____ for the use and hire of certain household goods and furniture (*or other articles, as the case may be*) let to hire and delivered by this deponent to the said *R. R.* and at his request.

Hire of goods, &c.

_____ for freight, primage, and average due and payable from the said *R. R.* to this deponent, upon, for and in respect of divers goods carried and conveyed by this deponent in and on board of a certain ship or vessel for the said *R. R.* and at his request.

For freight, &c.

_____ for the lighterage of divers goods carried and conveyed in certain lighters and other vessels, of this deponent, for the said *R. R.* and at his request.

For lighterage.

_____ for the use of a certain ship or vessel of this deponent, (*or the master may make the affidavit, in which case, after "vessel," say, "whereof this deponent is master,"*) retained and kept by the said *R. R.* with divers goods and merchandizes on board thereof on demurrage, for a long space of time now elapsed, at the request of the said *R. R.*

For demurrage.

FOR ESTATES BARGAINED, &c., USE AND OCCUPATION, &c.

_____ for a certain messuage or tenement and premises, with the appurtenances of this deponent by him bargained, sold, and released to the said *R. R.* at his request.

For a freehold messuage, &c.

* It will be recollected, that an affidavit is not a mere general form like a count of a declaration; and this observation is particularly applicable to this

precedent, however loosely worded it appears, but it is found in most books of practice.

AFFIDAVIT of Debt; Estates, &c.; AFFIDAVIT generally.

For a copyhold
messuage, &c.

_____ for a certain messuage, &c. of this deponent by him bargained, sold, and surrendered to the said *R. R.* at his request.

For a leasehold
house assigned.

_____ for a certain messuage, &c. of this deponent by him bargained, sold, and assigned to the said *R. R.* at his request, for the remainder of a certain term of years therein to come and unexpired.

For use and occu-
pation of a house.

_____ for the use and occupation of a certain dwelling-house, with the appurtenances, of this deponent, held and enjoyed by the said *R. R.* as tenant thereof to this deponent for the space of _____ now elapsed.

The like of a
house, farm, and
lands.

_____ for the use and occupation of a certain dwelling-house, farm, and lands, with the appurtenances (*as in the last*).

For a vicarage
house and glebe
lands, tithes, &c.

_____ for the use and occupation of a certain vicarage house and glebe lands, with the appurtenances, and of the vicarial tithes of the several titheable farms and lands in the parish of _____ in the said county of _____ of this deponent, held and enjoyed by the said _____ as tenant thereof to this deponent, for _____ now elapsed.

The like of rooms.

_____ for the use and occupation of divers rooms and apartments, in and parcel of a certain dwelling-house of this deponent, held and enjoyed by the said *R. R.* as tenant thereof to this deponent for the space of _____ now elapsed.

IN TROVER.

Observations as
to affidavit in tro-
ver.

An affidavit to hold to bail in trover and detinue must state the circumstances under which the plaintiff claims to be entitled to the property; the particular articles of which it consists and their value; how it came to be possessed by the defendant; that he has converted the same to his own use, or that he has refused to deliver it on demand to the plaintiff, R. T. G. III.

FOR AN ASSAULT.

Observation as to
affidavit to hold
to bail for an as-
sault.

The affidavit must state the whole particulars of the assault; and to entitle the plaintiff to hold the defendant to bail, it must appear to have been a very grievous one.

It should also seem, that although the assault may not have been of a very grievous nature, yet if, together with a statement of sufficient circumstances, it shall be sworn that the defendant is about to depart the realm, and that thereby the plaintiff may be defeated of redress, a judge will make an order for arrest.

As such order is in these cases requisite, a discretion to make or withhold it is implied, and therefore the practiser should be aware that a plaintiff will not be allowed to hold a defendant to bail in a civil action for a light or trivial assault.

AFFIDAVIT, generally. And see tit. **AFFIDAVIT OF DEBT**, ante. **PRISONER**, post. In the foregoing title the law and practice relating to the affidavit of debt in order to hold to bail, have been treated; but under this title, a few points likely to occur in practice with relation to other affidavits, will be stated.

What must be
stated on motion
for a rule nisi.

On motion for a rule *nisi* when the cause is already in court, *R. G. H. 36 G. III.* requires that the affidavit be made before the motion for the rule, and that at the time of making the motion the affidavit be produced in court; and also, that it be entitled in the proper court, *Osborn v. Tatum*, 1 *B. & P.* 271, and in the proper cause, *Roberts v. Giddins*, *id.* 337. This point was ruled on motion for a rule *nisi* for staying proceedings on a bail bond

against the bail, and the affidavits were wrongly entitled in the original action.

Merits not to be sworn by a third person, 1 *Chit. R.* 723, unless attorney or agent in the cause. *Morris v. Hunt*; *Id.* 97. By whom merits may not be sworn.

All the circumstances upon which an application to the court may be made, should be fully stated; for no affidavit containing new matter will be received, though affidavits explanatory of the former ones are admitted. *Salloway v. Whorewood*, 2 *Salk.* 461. Must not contain new matter; though explanatory affidavits are received.
So where the application is upon collateral matter, as taxation of costs, the affidavit must not go into the original merits. *Williams v. Hunt*, 1 *Chit. R.* 321.

Nor may an affidavit be slanderous. *Saunderson's Bail*, 1 *Chit. R.* 676. And see *Id.* 165. Where otherwise, bad.

Omission of a deponent's addition, is bad. *Thurle v. Faber*, 1 *Chit.* 465. And see *ib.* 721.

No counter affidavits can be received to contradict articles of the peace. *The King v. Doherty*, 19 *East*, 171-4. *The King v. Lord Vane*, *Id.* 171. n. And see *Shaw v. Mansfield*, 7 *Price*, 709.

Affidavits in answer to a rule for a *mandamus* sworn before a commissioner must contain the place where sworn, otherwise they cannot be read. *The King v. The Justices of the West Riding of Yorkshire*, 3 *M. & S.* 493. Place in jurat necessary.

So "at Beverley," without saying in what county, bad, *Boyd v. Straker*, 7 *Price*, 662.

The affidavit must be well entitled; the whole names of all the parties to the cause being inserted in the title. *Owen v. Hard*, 2 *T. R.* 643. *Fores v. Diemar*, 7 *T. R.* 661. *Noel and others v. —*, 1 *Smith Rep.* 457. *Buckley v. Tweedie*, 2 *Smith Rep.* 394. *Ballman v. Callow*, 1 *Chit. R.* 727. *Ethrington v. Kemp*, *Id. ib. acc.* *Anon.* 1 *Chit. R.* 728. n. *Doe, d. Spencer v. Want*, 2 *J. B. Moore*, 722. How to be entitled.

Although, if several defendants be joined in one common process, one, upon whom it is irregularly served, applying before declaration for rule to set it aside, may entitle his affidavit in a cause of the plaintiff against himself only. *Dand v. Barnes*, 6 *Taunt.* 5, but in action against two, not bailable, one defendant may, before declaration, well stile his affidavits in a cause of *A.* against *B.* who is sued with *C.* *Mackenzie v. Martin and another*, 6 *Taunt.* 286.

An affidavit entitled "In the King's Bench," upon which the Attorney-General had filed an information *ex officio*, against the defendant, permitted to be read in aggravation after judgment by default. *The King v. Morgan*, 11 *East*, 455.

As to *entitling* affidavits *properly*, many decisions have been made in both courts, the general principle of which seems to be, that in all cases in which a cause hath not been entertained in court previously to the time the affidavit is tendered to be read, an affidavit, if *entitled* in a cause, cannot be received: thus, an affidavit for leave to file a criminal information may *not*, and *that* in answer to the same, or on shewing cause, must be entitled. *Regem ats. Jones*, 2 *Salk.* 704, or it is optional. *Rex v. Robinson*, a *MSS.* case there cited, *notis*; or they need not, *The King v. Harrison and others*, 6 *T. R.* 60. The cause being entertained, it

AFFIDAVIT *generally; Entitling, &c.*

seems now settled that the affidavits in answer to a rule to shew cause, must be entitled. *Bevan v. Bevan*, 3 *T. R.* 601. *Fores v. Diemar*, 7 *T. R.* 661.

Affidavits not entitled "In the King's Bench," and sworn before *A. B.* a commissioner, &c. without stating himself to be a commissioner of K. B. cannot be read; but those sworn in court, or before a judge of the court, though not entitled "In the King's Bench," may be read. *The King v. Hare*, 13 *East*, 189. And see *Bland v. Drake*, 1 *Chit. R.* 165. *acc.*

On motion for attachment.

Until the attachment issue the affidavits must be entitled with the names of the parties; but thence the king is to be named as the prosecutor. *Wood v. Webb*, 3 *T. R.* 253. *The King v. the Sheriff of Middlesex*, 7 *T. R.* 439. Same *v. Same*, *ib.* 527, of course, therefore, until the attachment issue, the affidavits are to be entitled on the civil side of the court; after, on the criminal side. *Whitehead v. Firth*, 12 *East*, 165.

If sworn before attorney in cause not to be read. Exception.

No affidavit, except that of debt for holding to bail, sworn before an attorney in the cause can be read. *The King v. Wallace*, 3 *T. R.* 403. *Hopkinson v. Buckley*, 8 *Taunt.* 74, but if his clerk be a commissioner, and take the affidavit, it may be read. *Goodtitle, d. Pye, v. Badtyle*, 8 *T. R.* 638. And in *Jenkins v. Mason*, 3 *J. B. Moore*, 325, where the attorney for an insolvent had sworn to his having been discharged under the Insolvent Debtors Act, affidavit was not allowed to be read.

And although an affidavit be sworn before the party's own attorney, yet if he be not the attorney on record, it shall not vitiate. *Read v. Cooper*, 5 *Taunt.* 89.

But that the name of the attorney subscribing the affidavit, and that of the attorney on record merely *appear* to be the same, forms no ground for rejecting the affidavit. *Hodgson v. Walker*, *Wightw.* 62.

If deponent be illiterate.

As to the deponent appearing from his signature to be illiterate, the jurat must be special.—See AFFIDAVIT OF DEBT, *pa.* 19, *ante*, and the names of all the deponents must be stated in the jurat. *R. G. M.* 37 *G. III.* 7 *T. R.* 82.

Also *when sworn*. 1 *Chit. R.* 128.

When attestation dispensed with or not.

Where an affidavit appears to have been made before a great judicial officer in Ireland, C. P. from courtesy, dispensed with an attestation of the signature. *Ex parte Worsley*, 2 *H. Bl.* 275. *Aliter*, where affidavit made before a foreign magistrate, *Id. ib.*

And affidavits sworn before a justice of peace in Scotland, are admissible in a cause in K. B. if the hand writing of the justice be authenticated. *Turnbull v. Moreton*, 1 *Chit. R.* 721. *Id.* 463.

As to time for filing affidavits.

Affidavits which ought to have been filed before Hilary Term may be read with leave of the court on shewing cause on the second day of term, though filed after the specified time. *Hoar v. Hill*, 1 *Chit. R.* 27. *R. M.* 36 *G. III.* K. B.

Where, by the terms of the rule, no particular time is prescribed for filing the affidavits on which cause is shewn, they may be sworn and filed at any time before shewing cause, though after the day appointed by the rule. 1 *Chit. R.* 27. *n.* *Tilley v. Henley*, *Id.* 136. *S. P.*

But if, in order to give an opportunity for shewing cause, the court of Exchequer open a rule which had been made absolute on affidavit of service, that court will not hear affidavits which had been sworn after the day on which the rule had been made absolute. *Tripp v. Balamy*, 5 *Price*, 384.

And in shewing cause against a rule in a cause which had been previously before a Judge at chambers, the same affidavits cannot be used, unless they are re-sworn and re-stamped. *Chitty v. Bishop*, 4 *J. B. Moore*, 413.

Time given to obtain a further affidavit in compliance with the rule of court, *M. 59 G. III.* that the motion to set aside an attachment was made for the only indemnity of the bail, and at their sole expence. *Rex v. Middlesex (Sheriff of)*, *Id.* 347. n.

Clerical errors are not a sufficient ground for rejecting an affidavit. *Bromley v. Forster*, *Id.* 562.

Affidavit not vitiated by clerical errors.

Such as "defendant" instead of "deponent," "court" instead of "office"—held immaterial, where the meaning was clear; *aliter* where the mistake leaves the meaning doubtful. *Anon. Id.* 562, n. But "served a true" omitting "copy," is bad. *Anon. Id. ib.*

Affidavit which relates to several indictments must have several stamps. *Rex v. Carlisle*, *Id.* 451.

As to stamp.

Two separate affidavits on one stamp cannot be read. *Anon. Id.* 452. n.

AFFIRMANCE-DAY, GENERAL. In error in the Exchequer Chamber. A day appointed by the judges of the Common Pleas and Barons of the Exchequer to be held a few days after the beginning of every term for the general affirmance or reversal of judgments. 2 *Tidd*, 1091. See tit. **ADJOURNMENT DAY IN ERROR**, *ante*, page 12.

AFFIRMATION. See tit. **ATTORNEY**, *post.* Quaker's affirmation sufficient to hold to bail, 1 *Comp.* 392. *Willes*, 292. n.

And to ground an attachment for not performing an award, 1 *Str.* 441. n. And see *Willes*, 292. n. *aliter* *Robins v. Sayward*, 1 *Str.* 441. and cases cited n. *ib.* 2 *Tidd*, 870. but who cites cases *semb. cont.* n. *ib.*

AGENT. See tit. **ATTORNEY**. **CERTIFICATE**, *post.*

An agent is an attorney who transacts the business of another attorney.

Practical definition.

The agent owes to his principal the unremitting exertions of skill, and ability, and that all his transactions in that character, shall be distinguished by punctuality, honour, and integrity. Large and extensive as these obligations are, in no department of the law, it is remarked, are they more scrupulously fulfilled than by the London agents.

His duty.

The later decisions affecting the relation of attorney and agent are as follow :

All notices, declarations, pleas, and other proceedings necessary in a country cause, must be given and delivered to the agent in town. *Hayes v. Perkins*, 3 *East*, 569. And see *Tashburn v. Havelock*, *Bar.* 306. If time to plead hath been given by the agent, the principal cannot sign judgment until that time be expired. Where agent entered an appearance for the defendant,

As to service of notices, &c.

and the plea was delivered in the name of the principal, plaintiff signed judgment, but which was set aside. *Buckler v. Rawlins*, 3 B. & P. 111. The acts of agents in town are binding on their respective principals, *Griffiths v. Williams*, 1 T. R. 710. In K. B. notice of trial or of executing a writ of inquiry, and also notice of countermand or continuance of notice of enquiry must be given in town, and not in the country, 1 *Tidd*, 111. *Imp.* 485. But in a country cause, a countermand of notice of trial may be given in the country, 1 *Tidd*, 111. who cites 2 *Str.* 1073. *Cas. temp. Hardw.* 369. S. C. and *Imp.* K. B. 482. But as the object of the countermand is to save costs, notice served in the country seems proper. It appears by decisions in C. P. that notice of enquiry in a country cause may be given either to agent or to attorney in the country. *Smith v. Lacock*, *Bar.* 305. *Tashburne v. Have-lock*, *ib.* 306. And so of notices of trial and countermand, 1 *Tidd*, 111. But of those things which are to be done only in town, notice must be to the agent. *Id.* *ib.*

As to payment to agent.

Payment to the agent employed by the attorney on record is not payment to the principal, though payment to the attorney is. *Yeates v. Freckleton*, *Doug.* 623.

Who may act as agent.

An agent cannot act as such for a person unqualified to be an attorney on pain of being struck off the rolls. 22 G. II. c. 46. s. 11.—See tit. ATTORNEY, *post*.

When not bound to act for principal.

Though an attorney be the known agent of a principal against whom a bill may be delivered, the agent is not bound to accept it. *Per Cur.* 39 G. III. K. B. 1 *Tidd*, 86. n.

As to his bill.

The agent's bill is taxable on the money being brought into court. *Dixon v. Plant*, *Doug.* 199. n. *Groome v. Symonds*, *E.* 35 G. III. K. B. 1 *Tidd*, 95. *Id.* 314. But it has been repeatedly decided, that it need not be signed previously to delivery. *Pea. Ca. N. P.* 1, 2. 1 *Esp. Ca. N. P.* 221.

Has a lien.

And the town agents of a bankrupt country attorney have a lien against his assignees, *Bray v. Hine*, 6 *Price*, 203.

Part of the clerkship to the attorney may be served with the agent.

It seems, that by the 8th sect. of the 46th chap. of the 22 G. III. an articulated clerk to an attorney may serve part of his time with that attorney's agent. But by R. T. 31 G. III. K. B. 4 T. R. 379, he is not at liberty to serve such agent more than a year.

AGREEMENT by ATTORNEY. See tit. COGNOVIT, ERROR, EXECUTION, NOTICE, STAMP, TERMS NOTICE, *post*.

How far binding.

An agreement of the attorney on behalf of either of the parties to the suit not to bring a writ of error, is binding on the client. *Cates v. West*, 2 T. R. 183, and so it is presumed of all other agreements respecting proceedings over which the attorney may be supposed to have control; and executors are bound by such agreement of attorney on the part of a testator. *Executors of Wright*, *Bart. v. Nutt*, in error. 1 T. R. 388.

And an agreement by an attorney to conduct a cause for a specific sum must be declared upon specially. *Guy v. Gower*, 2 *Marsh.* 273. But query its legality, *id.* *ib.*

By a third person as to bail.

But agreement with the sheriff or his officers by a third person to put in bail for the defendant at the return of the writ; or surrender his body; or pay debt and costs, is contrary to the statute 23 H. VI. c. 9, and void. *Rogers v. Reeves*, 1 T. R. 418. So an

agreement of this description by attorney is void. Fuller and others v. Prest, 7 T. R. 109. Parker v. England, 3 Smith, 52. Sedgworth v. Spicer, 4 East, 568. By an attorney as to bail.

AID PRAYER. The title of a plea or petition by which a defendant in court calls in help from another person claiming an interest in the thing contested. The plea being in the nature of a dilatory one, must be verified by affidavit. Onslow, demandant, Smith, tenant, 2 B. & P. 384.

AIEL, OR BESAIEL. The name of a writ issued at the instance of a party claiming lands of which his grandfather was seised. F. N. B. 507. It is now obsolete, having, with other writs for the trial of right to real property given place to proceeding by ejectment.

ALIAS. *Another.* A term in practice applied to a writ sued out next after the first. See the WRITS under their respective titles.

ALIEN. See tit. ARREST, *who privileged from*. BAIL BOND. HABEAS CORPUS, *post*. If a defendant be sent out of the kingdom on Alien Act, 33 G. III. c. 4. the bail bond to the sheriff may be cancelled. Postell v. Williams, 7 T. R. 517, and unless the bail above are indemnified in some way, an *exoneretur* may be entered. Merrick v. Vaucher, 6 T. R. 50. Coles v. De Hayne, *Id.* 52. S. C. *Id.* 246.

ALIEN ENEMY. Plea of, in abatement, must be supported by affidavit.

It may be taken as a general rule, that no action can be maintained either by or in favour of an alien enemy; and an Englishman living in and carrying on trade under the protection and for the benefit of a hostile state, is within the rule. See Brandon v. Nesbitt 6 T. R. 23. McConnell v. Hector, 3 B. & P. 113. De Metton v. De Mello, 12 East, 234. Roberts v. Hardy, 3 M. & S. 583. Flindt v. Waters, 15 East, 260. Willison v. Patteson, 1 J. B. Moore, 133. 7 Taunt. 439. S. C.

But where statute prohibited payment to persons residing under the government of France, and the plaintiff lived in Holland, C. P. refused to discharge a defendant on that ground, Pieters v. Luytjes 1 B. & P. 1. Nor would K. B. interfere where, after verdict, plaintiffs became alien enemies, Vanbrynen v. Wilson, 9 East, 321. And it seems that the court will not, by habeas corpus, at the instance of his bail, exercise any jurisdiction over an alien already in custody about to quit the country, Folkein v. Critico, 13 East, 457.

It is no defence to an action on a bill of exchange, that the plaintiff sues in trust for an alien enemy, Daubuz v. Morshead, 6 Taunt. 332.

And it seems that it is the state and not the person which constitutes an alien enemy. See Sparemburgh v. Bannatyne, 1 B. & P. 163.

And where the original contract was made abroad; neither an acknowledgment of the debt in England, nor laying out of money in England, if in furtherance of such contract, were held sufficient to enable the plaintiff to hold the defendant to bail here; Lord Eldon, *Ld. Ch. J.* C. P. saying, that the contract was not

ALLOCATUR; ALLOWANCE TO PRISONER.

altered by the locality of the expenditure. See *Sinclair v. Charles Philippe Monsieur de France*, 2 B. & P. 363.

And as to pleading "Alien enemy," see *Casseres v. Bell*, 8 T. R. 166. *Le Bret v. Papillon*, 4 East, 502.

What.

ALLOCATUR. The term by which the master's or prothonotary's allowance of a sum referred for his consideration, whether touching costs, damages, or matter of account, is called.

How enforced.

Such allocatur may be enforced, if for costs only, on motion for a rule for an attachment, which is absolute in the first instance. *Thompson v. Billingsley*, 37 G. III. K. B. *Tidd*, 492. And see *King v. Price*, 1 Price, 341. If for costs under an award, *Tidd*, 492; or if for money and costs, or for money generally, the rule is *nisi*. Per Buller, J. M. 24 G. III. *Tidd*, 492. *Chaunt v. Smart*, 1 B. & P. 477. See *Forr. Exch.* 80. And personal service is indispensable, and shewing the original. *The King v. Smithies*, 3 T. R. 351. *aliter*, 2 Price, 2. And the court, on shewing cause against a rule for an attachment on *allocatur*, will not go into the accounts which were the subject of reference. Per Cur. M. 45 G. III. 1 *Tidd*, 493. The rule *nisi* for non-payment of money on the master's *allocatur* cannot be served on a Sunday. *M'Illeham v. Smith*, 8 T. R. 86. An attorney to whom, after taxation of his bill, money was to be paid on the prothonotary's *allocatur*, is entitled to the possession of the order with the *allocatur* thereon; that he may enforce the payment by making the order a rule of court. *Alger v. Hefford*, 1 Taunt. 38. This applies to C. P. but in K. B. the order remains with the party obtaining it. And in C. P. arrest on *allocatur* is bad. *Fry v. Malcolm*, 4 Taunt. 705.

Indorsement of *allocatur* on *postea* not evidence, without production of judgment. *Foster v. Compton*, 2 Stark. N. P. 364.

See tit. AFFIDAVIT OF DEBT, *ante*. ATTACHMENT FOR COSTS, *non-payment of, post*.

What.

ALLOWANCE TO A PRISONER.* A sum payable to him in default of his discharge under the Lords' Act, and under subsequent acts recognizing and extending the same.

Observations.

The statutes and cases will be briefly noticed; the Practical Directions will follow; and lastly, the Forms.

How prisoner in execution for 100*l*. Since extended to 300*l*. &c.

Stat. 32 G. II. c. 28. s. 13, enacts, that if a prisoner charged in execution for any sum not exceeding £100, (by stat. 33 G. III. c. 5. extended to £300, and made perpetual by stat. 39 G. III. c. 50. Stat. 49 G. III. c. 6. extends to contempts in non-payment of costs or money in equity. And stat. 57 G. III. c. 117. extends to persons imprisoned on extents in aid. See 3 Price, 95.) shall be minded to deliver up to his creditors all his estate and effects in satisfaction of his debts, he may, in order to entitle himself to the benefit of the above acts, before the end of the first term next after

may entitle himself to the benefit of the act.

* Although the plaintiff may, under these statutes, compel in the way thereby prescribed, a prisoner at his suit, to make a full disclosure of his estate and effects, yet resort for that purpose is seldom had to the statutes. But as the

prisoner most frequently seeks to obtain under them the allowance therein specified, the acts and cases occurring upon them are mentioned, generally, under the title. But see tit. INSOLVENT DEBTOR, *post*.

he shall be charged in execution, exhibit a *petition* to the court from whence the process issued, upon which he was charged in execution, or to the court into which he shall be removed by *habeas corpus*, or charged in custody, certifying the cause of his imprisonment, and setting forth a just and true account of all the real and personal estate which he or any person in trust for him was or were entitled to at the time of his so petitioning, and also at the time of his first imprisonment, and of all incumbrances and charges (if any) affecting the same, and likewise a just and true account of all securities, deeds, evidences, writings, &c. concerning the same, and the names and places of abode of the witnesses to such securities, &c. And it is also enacted, "that before such petition can be received such prisoner shall give to or leave with his creditor, at whose suit he shall be so charged in execution, his executors and administrators, or in case such creditor, &c. cannot be found, then to be given to or left with the attorney or agent last employed in such action, fourteen days at least before any such petition shall be presented and received a notice in writing, signed by such prisoner, see *New. Rep. C. P. 67*, importing that such prisoner intends to *petition the court*, and also setting forth a true copy of the schedule, including the whole real and personal estate of such prisoner, which he intends to deliver into court, except the necessary wearing apparel and bedding of the prisoner and his family, and his tools not exceeding £10 value in the whole." An affidavit of the service of such notice is to be delivered with the petition. If the court shall be satisfied as to such notice, &c. the petition is to be received, and the court shall by rule or order cause the prisoner to be brought up to such court, and by the same rule or order the creditor is to be summoned to appear personally on a certain day, and in case the creditor shall appear in person or by attorney, or in default of such appearance, then upon affidavit of the due service of such rule or order, such court shall in a summary way examine into the matter of every such petition, and hear what shall be alleged against the discharge of any such prisoner who shall so petition. The court may tender an oath to prisoners, and also order an assignment to be made on the back of the said petition of the prisoner's estate and effects. The creditor may then take possession, &c.

What petition shall contain.

Prisoner to give notice.

What it shall contain.

An affidavit to be made.

What the court may order.

See tit. *Assignee of Insolvent Debtor under Lords' Act*, *post*.

But if the creditor be not satisfied with the schedule or oath of the prisoner, and shall either personally, or in case of inability to attend, of which inability the court is to be satisfied, he may attend by his attorney and desire further time for information upon the subject of such schedule or such oath, and the prisoner may be remanded to appear on some other day, at *farthest* within the first week of the term next following, but sooner if the court think fit. All objections in point of form to be made at the first time prisoner is brought up.

If creditor be dissatisfied

prisoner may be remanded.

When all formal objections are to be made.

The act further provides that if creditor, &c. do not appear the second time, or if appearing shall be unable to discover any estate or effects of the prisoner omitted in his petition, the court shall

When prisoner may be discharged.

ALLOWANCE TO PRISONER; STATUTES; CASES.

- by rule or order thereof discharge him on his executing the assignment therein before directed.
- When not.** Unless such creditor, &c. do insist upon such prisoner's being detained in prison, and shall agree by writing signed, &c. or if out of England, under the hand of his attorney, to pay and allow a weekly sum not exceeding *2s. 4d.* per week, (by the 37 G. III. c. 85. s. 3, augmented to *3s. 6d.* if more creditors than one, not exceeding *2s.* a week each), in the discretion of the court, every Monday, &c. in which case prisoner to be remanded.
- What prisoner to be paid per week every Monday.** The act further provides, that in case of failure in due payment prisoner shall be discharged an application to the court in term time, and to a judge in vacation, proof being made on oath of the non-payment; but previously to discharge the assignment therein, herein-before directed to be executed. Prisoner refusing to take the oath, or taking it shall be detected of falsity, or shall refuse to execute the assignment, to be remanded.
- Or be discharged.** The act of 37 G. III. c. 85. s. 4. further provides, that in case of more than one creditor insisting on prisoner's detention, they are each to pay him a sum not exceeding *2s.* per week. This act is made perpetual by 39 G. III. c. 50.
- On what conditions.** And by the 26 G. III. c. 44. s. 3, and 33 G. III. c. 5. s. 4. the act is extended to prisoners under attachments for not paying money awarded under arbitration bonds. *The King v. Myers*, 1 *T. R.* 266; or for costs generally, *The King v. Pickerill*, 4 *T. R.* 809; or for costs in the Spiritual Courts, 33 G. III. c. 5. s. 4.
- If more than one creditor, what paid.** By the 26 G. III. gaolers are to give notice of the act to all persons in their custody for debt within three days after their being charged in execution, on penalty of £50, which must be sued for within six calendar months.
- To what cases the act extends.** S. 5. ignorance or mistake is not to prevent prisoner from availing himself of the act, though he shall have omitted to do so within the time above prescribed.
- Gaolers are to give notice of the act to prisoners.** Creditor may file interrogatories for the examination of the prisoner before he can avail himself of the act. See PRACTICAL DIRECTIONS subjoined.
- Prisoners though ignorant to have the benefit of the act.** But the acts do not extend to the crown nor *qui tam* debtors, nor "affect any proceedings which at any time may be lawfully had "under or by virtue of any commission of bankrupt."
- Creditor may file interrogatories.** These acts extend to prisoners charged in execution on process issuing out of inferior as well as superior courts. *The King v. The Bailiffs of Ipswich*, 7 *East*, 84. 3 *Smith*, 102. S. C.
- To what acts do not extend.** An insolvent debtor may be brought up after the ordinary time allowed, on affidavit of his ignorance of the creditor's place of abode until recently before his application, within the saving clause of the statute 33 G. III. c. 5. s. 5. *The King v. Wakefield*, 13 *East*, 190. See also *acc. Nicholls v. Neilson*, 2 *Marsh.* 200.
- Extend to inferior Courts.** One convicted upon an indictment for an assault, who upon reference to the king's coroner and attorney, was directed by his award to pay so much for costs and so much for compensation to the prosecutrix, is entitled to be discharged as an insolvent debtor under the Lords' Act, 32 G. II. c. 28. without the aid of the stat. 33 G. III. c. 5. *ib.*
- Cases.**

Prisoner will be entitled to the benefit of the acts though the plaintiff be dead. *The King v. Davies*, one, &c. 1 B. & P. 336, and though prisoner may have agreed not to avail himself of the acts. *Parish v. Wolstoncraft*, 3 Smith, 51.

The execution must be for a sum under £300, for where a prisoner was taken in execution for more than that sum, and afterwards reduced the debt below it, he was not entitled to his discharge unless the debt had been so reduced the next term after he was taken in execution. *Ex parte Hubbard*, 1 B. & P. 423.

Prisoners who have taken the benefit of general Insolvent Acts cannot avail themselves of the Lords' Act. *Jalassio v. Longhurst*, 2 Smith, 24, unless they shall be compelled to make a disclosure and deliver up their estate and effects. *Chilton v. Shee*, *ib.* 25. n.

The judgment remains in full force against the estate and effects of a prisoner discharged under these acts, except wearing apparel, tools, &c. of the value of £10.

What effects not liable.

The 33 G. III. extends these acts to prisoners in execution under £300, and the 39th renders them perpetual.

The cases which have occurred, and the points which have been ruled on these acts, respecting the allowance, are the following:—

As to what shall be said to be "charged in execution," it means where a person is actually delivered over to the marshal, and is detained within the walls of the prison. So that if defendant having been arrested by a *capias ad satisfaciendum* escape, and shall afterwards be retaken and committed in the next term, he may apply in the following term to be discharged under the Lords' Act. *Vaughan v. Durnell*, 4 T. R. 367.

Meaning of the term "charged in execution."

It has been said, that unless the application for the discharge be made before the end of the next term after being charged in execution, the court hath no jurisdiction, *Williams v. Rougheedge*, *Bur.* 747, but the 26 G. III. c. 44. s. 5, provides relief for those prisoners who may have neglected to avail themselves of the act through ignorance or mistake, or by the misconduct of agent. *Pearce v. Taylor*, 4 T. R. 231.

When prisoner to apply.

The fourteen days notice required by the act excludes only one of the days. *Morley v. Vaughan*, *Bur.* 2525, and where petition was lodged in time, but full notice not given, prisoner was allowed to give new notice. *Williams v. Rougheedge*, *Id.* 747.

Computation of the 14 days.

But where he neglects to give notice, he may be retaken in execution, though discharged a year. 1 *Chit. R.* 740.

Where may be retaken.

And where remanded, the court in its discretion may order him to be brought up the same term. *Bates v. Gamble*, *Bur.* 1393. but it is matter of course to remand prisoner the first time, at the instance of creditor; the second time, however, plaintiff must be fully prepared as to the falsity of the schedule, but cannot then object to informality. *Jenner v. Swann*, *Id.* 372. *Laker v. Wallis*, *Id.* 370; and if court hath once refused to discharge prisoner, he cannot afterwards on a new affidavit be brought up to be discharged. *Thornton and Another v. Dumphy*, 1 H. Bl. 101.

As to remanding prisoner.

The note must be made payable every Monday. *Lench v. Par-giter*, *Doug.* 68. *Blackmore v. Rouse*, M. 36 G. III. K. B. *Constantine v. Pugh*, 3 B. & P. 184.

Where cannot again be brought up.

When note to be made payable.

What parties,
plaintiffs, must
sign note.

Where partners are plaintiffs, and one signs the note, he must sign it for himself and partners. *Meux v. Humphrey*, 8 *T. R.* 25.

Where there are several plaintiffs, not partners, *all* must sign the note. *The King v. Wilkinson*, 7 *T. R.* 156; so one executor, without mentioning the rest, is bad. *La Pine and Others, executors v. Bailey*, 8 *T. R.* 325.

When to be
sealed.

A corporation may seal the note with its seal. *Doc, d. Cutlers' Company v. Hogg*, 1 *N. R. C. P.* 306.

No stamp.

No stamp is necessary, *Tekell v. Casey*, 7 *T. R.* 670. *Bowring v. Edgar*, 1 *B. & P.* 271. And it is valid though it do not state the style of the court in which action is brought. *Anon.* 2 *Sm. R.* 642.

If plaintiff cannot
attend.

If plaintiff cannot attend attorney may make affidavit that he saw him sign, and that he witnessed the note, but it must be delivered in court. 2 *Sel.* 350. who cites *Impey*, K. B. 646; and where the affidavit was written on the same paper with the note, and not properly entitled, though the note was, the prisoner was discharged. *Buckley v. Tweedie*, 2 *Sm. R.* 393.

Where plaintiff
must sign it.

If he be in England the plaintiff *must* sign the note. 2 *Sel.* 350. n.

When allowance
to be paid.

The allowance must be paid to the turnkey only on the debtor's side, when due, that is, every Monday, 1 *Sel.* 351. n.; payment to the person who opened the prison door was considered good. *Parsons v. Salmon*, 1 *N. R.* 111; before ten at night, *Fisher v. Bull*, 5 *T. R.* 36; and, if the turnkey do not object, a French half crown is a good payment, *ib. n.*

In what coin.

Times for bringing
up prisoners
in town.

Mondays and Thursdays are the days for bringing up debtors under the Lords' Act, *R. H.* 37 *G. III.* within twenty miles of Westminster Hall; and in the Exchequer at the rising of the court. 5 *Price*, 648.

K. B. C. P.

In Hilary and Michaelmas Terms on the days appointed for the London Sittings at N. P. and on Saturdays. In Easter on the days appointed for the same sittings, on Tuesdays, and on the last Saturday in term. In Trinity Term on the days appointed for the same sittings, and on Tuesdays within twenty miles of Westminster Hall. *R. M.* 47 *G. III.* *R. M.* 46 *G. III.* 2 *N. R. C. P.* 98.

If in the
country.

The 32 *G. II. c.* 28. s. 15. provides, that if the prisoner is charged in execution above twenty miles from Westminster Hall, or the court out of which the execution issued, the rule requires him to be brought to the next assizes, and that the creditor be summoned to appear there, and a copy of such rule is to be served on such creditor, his executors, &c. or left with his or their attorney fourteen days at least before the holding such assizes.

Power of judge
at the assizes.

The court or judge of assize hath like powers of determination, as the courts at Westminster, and the Forms with relation to the assignment, &c. are the same.

What must be
included in the
schedule.

The practitioner should be aware that whatever a prisoner might sell for his own benefit must be included in the schedule. *Flarty v. Odum*, 3 *T. R.* 681; as for instance, the place of life-guardsmen; which he must sell before he can avail himself of the act, and must insert the value in his schedule, recognized *ubi supra*. *Jones's case*, *M.* 14 *G. III.* 1 *Tidd*, 388. But half-pay as an officer is not an object of sale, and therefore need not be inserted in the

Exception.

schedule. *Flarty v. Odum*, 3 T. R. 641; nor the profits of the ecclesiastical benefice. *Arbuckle and Another, assignees, &c. v. Cowtan*, 3 B. & P. 321.

PRACTICAL DIRECTIONS.

ON THE PART OF THE PRISONER. K. B.

The above abstracted acts are very particular in directing the proper steps to be taken on the part of the prisoner, but some material points will be briefly noticed.—See FORMS subjoined.

Upon the notice of the prisoner's intention being duly served, leave the petition, with an affidavit of defendant's signature, a certificate or copy of causes with which defendant stands charged, which is to be obtained from the office of the clerk of the papers at the King's Bench prison; and lastly, an affidavit of the due service of the notice with the clerk of the rules; obtain rule; serve one copy of same on the plaintiff, or his attorney, personally, and another on the marshal. The rule specifying the day when the prisoner is to be brought into court, be in court on that day ready with an affidavit on unstamped paper of the service of the copies of such rule, annexing the original rule; and if there be no valid objection to the schedule, and the plaintiff do not offer the note to pay the allowance, the prisoner will, on executing the assignment of the estate or effects mentioned in the schedule, be discharged.

If prisoner is in custody of marshal.

Be in court by half-past nine o'clock.

Get gaoler's certificate of the causes; make affidavit on unstamped paper of having seen him sign same; take same with petition, affidavit of service, the affidavit of the signature of the gaoler to the certificate to the clerk of the rules, who draws up the rule for the prisoner to be taken to the assizes; pay for same 2s. 6d.; serve copy at least fourteen days before the assizes on creditor, or his attorney, as before mentioned, and also on the gaoler; be ready at the assizes with affidavit of such respective services, and if no cause shewn, prisoner will be discharged.

If in a county gaol.

ON THE PART OF THE CREDITOR. K. B.

If, satisfied with, or unable to contradict the schedule the creditor be willing to give the allowance, he may attend on the day appointed, and sign and deliver the note in open court for the same to the defendant; but if he cannot attend, an affidavit must be made of his signature to the note; it must be duly witnessed by his attorney; and if the note so verified be then delivered, the prisoner will be remanded.

The first payment is commonly made at the time of delivering the note.

If the creditor desire further time to enquire into the truth of the schedule, it is granted of course; and he may file interrogatories, which must be answered before the prisoner can avail himself of the act.

By R. E. 36G. III. K. B. the interrogatories must be filed with the clerk of the rules, who thereupon draws up a rule for the debtor's examination before the master, to whom the original interrogatories are to be delivered. Get master's appointment on the rule, and serve copy of same on the prisoner. The debtor having been previously sworn in open court for the purpose, the master proceeds to take down, in writing, the examination of the debtor in answer to such interrogatories; and he is to sign such answer; these interrogatories, and the answers, are to be filed with the clerk of the rules, and read when the debtor shall, on a subsequent day, be brought up by rule for that purpose.

ALLOWANCE TO PRISONER; PR. DI.; FORMS.

ON THE PART OF THE PRISONER. C. P.

The practical directions are the same as in K. B. except as to the different offices and officers.

The petition, affidavit, and certificate of causes of the clerk of the papers of the Fleet prison, must be filed with the secondary, who draws up the rule (2s. 6d.) to be copied and served on the plaintiff, or his attorney, (at the same time shewing the rule) and on the warden, or gaoler, if a country cause.

ON THE PART OF THE CREDITOR. C. P.

And as to the interrogatories it may be observed, that whatever is directed to be done in relation to the office of the clerk of the rules of the King's Bench, will be executed by the secondary of this court; and whatever is to be done by the master of the King's Bench, with respect to the interrogatories, will be executed by the prothonotary. See 3 J. B. Moore, 317.

If in the country.

If in the country, the practical directions the same as K. B.—mutatis mutandis.

FORMS.

No. 1.
The notice.

[Court.]

Between { _____ plaintiff.
_____ defendant.

To Mr. _____

Take notice, that I intend, at the expiration of fourteen days from the delivery hereof, (or so soon after as I can be heard) to petition his majesty's court of _____ for such relief and benefit as I am entitled to by virtue of an act of parliament, made and passed in the thirty-second year of the reign of his majesty king George the Second, intituled "*An Act for the Relief of Debtors, with respect to the Imprisonment of their Persons,*" &c. and also of an act made and passed in the thirty-third year of the reign of his late majesty king George the Third, intituled "*An Act for the further Relief of Debtors,*" &c. and also of an act made and passed in the thirty-seventh year of the reign of his late majesty king George the Third, intituled "*An Act to amend so much of the first-mentioned Act as relates to the Weekly Sums thereby directed to be paid to Prisoners in Execution for Debt, in the Cases therein mentioned.*" And that I have no debts, estates, or effects whatsoever; nor had I at the time of my first imprisonment in this action, or at any time since, either in possession, reversion, remainder, or expectancy, other than and except, (if the prisoner possess any property he must say "what are mentioned and contained in the schedule or inventory hereunto annexed, and")

the necessary wearing apparel and bedding for myself and family, and the tools or instruments of my trade or calling, not exceeding the sum of ten pounds in value in the whole. As witness my hand, this _____ day of _____, one thousand eight hundred and _____

Witness

(Prisoner's name.)

No. 2.
The schedule.

A schedule or inventory of all the estate and effects which I _____ a prisoner in execution in the custody of _____ at the suit of _____ or any person or persons in trust for me, was or were possessed of or entitled unto at the time of my first imprisonment at the suit of the said _____ or at any time since, either in possession, reversion, remainder, or expectancy, other than and ex-

ALLOWANCE TO PRISONER; FORMS.

39

cept the necessary wearing apparel and bedding of or for me and my family, and the tools or instruments of my trade or calling, not exceeding ten pounds in value in the whole. As witness my hand, this — day of —, one thousand eight hundred and —

[Here set forth particularly the nature of the property, distinguishing the items, whether real or personal.

Estates must be sufficiently described, but if the prisoner be not entitled to any he may say, "I have none either in possession, reversion, remainder, or expectancy."

If the prisoner possess goods, he must particularize them.

So likewise debts, from whom, for what account, and on what (if any) security, which must also be particularly described as to date, parties, &c.]

[Court.]

Between { ——— plaintiff.
————— defendant.

————— of ——— in the parish of ——— in the county of ——— maketh oath and saith that this deponent was present and did see the above-named ——— sign his name (or mark) to the notice and schedule hereunto annexed, on the day of the date thereof, and also to a copy of the same. And that the name ——— subscribed as a witness thereto, is the proper hand-writing of this deponent.

Sworn

(Deponent's name.)

[Court.]

Between { ——— plaintiff.
————— defendant.

————— of ——— in the parish of ——— in the county of ——— maketh oath and saith that this deponent did, on ——— the ——— day of ——— serve the above named plaintiff with a true copy of the notice and schedule hereunto annexed, by delivering the same to ——— at ——— dwelling-house or place of abode, situate in ——— in the county of ———

Sworn

(Deponent's name.)

To the right honorable ——— and the rest of the judges of the same court.

The humble petition of ——— (Prisoner's name.)

Sheweth,

That your petitioner is a prisoner in ——— charged in execution at the suit of ——— for the sum of ——— as by the certificate annexed more fully appears.

That your petitioner humbly apprehends he is entitled to the benefit of an act of parliament made and passed in the thirty-second year of the reign of his majesty king George the Second, intituled "*An Act for the Relief of Debtors, with respect to the Imprisonment of their Persons,*" &c. And also of an act made and passed in the thirty-third year of the reign of his late majesty, king George the Third intituled "*An Act for the further Relief of Debtors,*" &c. And also of an act made and passed in the thirty-seventh year of his late majesty, king George the Third intituled "*An Act to amend so much of the first-mentioned Act as relates to the Weekly Sum thereby directed to be paid to Prisoners in Execution for Debt in the Cases therein mentioned.*"

That your petitioner hath not, at the time of exhibiting this his petition, nor had he at the time of his first imprisonment in this

No. 3.

Affidavit of the signature to be annexed to the last precedent.

No. 4.

Affidavit of the service of the notice and schedule.

No. 5.

The petition.

ALLOWANCE TO PRISONER, Forms; AMBASSADOR.

action, or at any time since, any debts, estate, or effects whatsoever, either in possession, reversion, remainder, or expectancy, other than and except (*if the prisoner possess any property he must say "what are mentioned and contained in the schedule or inventory hereunto annexed, and"*) the necessary wearing apparel and bedding for himself and family, and the tools or instruments of his trade or calling, not exceeding the sum of ten pounds in value in the whole.

Your petitioner being willing and desirous to conform himself to the directions of the said several acts, most humbly prays your lordships to grant a rule or order of this honorable court for the plaintiff to shew cause why he should not be discharged pursuant to the said acts.

And as in duty bound your petitioner will ever pray, &c.

(Prisoner's name.)

N. B. If necessary add schedule; same as that annexed to the notice, No. 2.

No. 6.
Affidavit of the
gaoler's signature
of certificate.

[Court.]

Between { _____ plaintiff.
_____ defendant.
_____ of _____ maketh oath and saith that he, this deponent, did see the keeper of his majesty's gaol or prison of _____ sign the certificate hereunto annexed, and that the name _____ set and subscribed at the foot of the said certificate, is of the proper hand-writing of the said _____

Sworn

(Deponent's name.)

No. 7.
Affidavit of the
service of rule.

[Court.]

Between { _____ plaintiff.
_____ defendant.
_____ of _____ maketh oath and saith that he, this deponent, did on the _____ day of _____ instant, personally serve the above-named _____ with a true copy of the rule hereto annexed.

Sworn

(Deponent's name.)

If the service were not personally on the plaintiff, say, after the word, "instant," serve the above named _____ with a true copy, &c. by delivering the same to the wife or servant of the said _____ at his dwelling-house or place of abode, situate at _____ in _____

(Deponent's name.)

No. 8.
The note.

I _____ (or we) _____ hereby promise to pay and allow to _____ three shillings and sixpence per week, weekly, on Monday in every week, for so long time as he shall continue in prison in execution at my (or our) suit. As witness my hand, this _____ day of _____

Witness

(Plaintiff's signature or signatures.)

No. 9.
The affidavit of
the plaintiff's signature to the note,
in case he cannot
attend, and of the
deponent's being
the subscribing
witness thereto.

[Court.]

Between { _____ plaintiff.
_____ defendant.
_____ of _____ maketh oath and saith that this deponent was present and did see the above-named _____ sign his name (or mark) to the note hereunto annexed on the day of the date thereof, and that the name _____ subscribed as a witness thereto, is the proper hand writing of this deponent.

Sworn

(Deponent's name.)

Abstract of stat.
7 Ann. c. 12.

AMBASSADOR. By stat. 7 Ann. c. 12. s. 3, all writs and processes that shall be sued or prosecuted, whereby the person of

any ambassador or other public minister of any foreign prince or state, authorized and received as such by her majesty, her heirs or successors, or the domestick or domestick servant of any such ambassador or other public minister may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void.

By sec. 4. In case any person shall presume to sue forth or prosecute any such writ or process, such person, and all attorneys and solicitors prosecuting and soliciting in such case, and all officers executing any such writ or process, being thereof convicted, by the confession of the party, or by the oath of one or more credible witness or witnesses, before the Lord Chancellor, or Lord Keeper of the Great Seal of Great Britain, the Chief Justice of the Court of Queen's Bench, the Chief Justice of the Court of Common Pleas for the time being, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the public repose, and shall suffer such pains, penalties, and corporal punishment, as the said Lord Chancellor, Lord Keeper, and the said Chief Justices, or any two of them shall judge fit to be imposed and inflicted.

By sec. 5. It is provided, that no merchant, or other trader whatsoever, within the description of any of the statutes against bankrupts, who shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by the act; and that no person shall be proceeded against as having arrested the servant of an ambassador or public minister, by virtue of this act, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted to the sheriffs of London and Middlesex for the time being, or their under sheriffs or deputies, who shall, upon the receipt thereof, hang up the same in some public place in their offices, whereto all persons may resort, and take copies thereof without fee or reward.

The ambassador must be received here, and

The privilege extends to all servants native and foreign; *Lockwood v. Dr. Coysgarne*, 3 *Burr.* 1676, residing in the ambassador's house, and to those who lodge elsewhere; *Evans v. Higgs*, 2 *Str.* 797. S. P. *Ld. Raym.* 524; but they must be actually and *bonâ fide* servants at the time of the arrest, S. C. 2 *Str.* 797. *Flint v. De Loyant*, *M.* 42 G. III. 1 *Tidd*, 216. *Seacombe v. Bowliney*, 1 *Wils.* 20. *Carolino's case*, *ib.* 78.

They must, pursuant to the statute, shew by affidavit at the time of the arrest, that they were such servants, and also the general nature of such their service, and that they were not traders. *Heathfield v. Chilton*, 4 *Burr.* 2016. but only the general nature of the service needs to be specified. *Tricquet v. Bath*, *ib.* 1478.

A purser in the navy acting as secretary to an ambassador, not privileged. *Darling v. Atkins*, 3 *Wils.* 33; but a secretary, though not a domestick, is, *Hopkins v. De Roebeck*, 3 *T. R.* 79.

And persons will be privileged although their names shall not have been registered at the sheriff's office, *ib.* though in that case no proceedings lie against the sheriff or his officers, 4 *Burr.* 1481.

Ambassador must be received.
Cases.
To whom the privilege extends.

What affidavit on application for discharge must contain.

A purser not privileged.

Where privileged though not registered.

AMBASSADOR; PR. DI.; FORM; AMENDMENT.

Qy. Whether a
consul general
be privileged.

Sir James Mansfield, C. J., C.P. seemed to doubt whether a
consul-general be privileged, *Clark v. Cretico*, 1 *Taunt.* 106. See
however, *Marshall v. Cretico*, 9 *East*, 447.

PRACTICAL DIRECTIONS.

*In case of a person privileged as above being arrested, and the sheriff
refusing to discharge him, apply at the sheriff's office for short copy
of the writ; and the proceedings may be either by HABEAS CORPUS,
which see; or by motion in term time, or by summons before a judge of
the court out of which process issues, in the vacation.*

Observation.

*The employ must not be colourable merely; for Foster, J. in Poitier
v. Croyer, 1 Bl. 48, said he recollected a case, where a clergyman swore
himself to be chaplain to the Morocco Ambassador.*

FORM.

*Form of an affidavit of material facts on which an application may
be made, in order to procure the discharge of the servant of an am-
bassador or foreign minister.*

[Court.]

Between { J. D. plaintiff.
R. R. defendant.

R. R. of ——— maketh oath and saith that this deponent was,
on the ——— day of ——— last past, arrested and is now in custody
at the suit of the above-named plaintiff, under and by virtue of [the
writ] ——— And this deponent further saith, that before and at
the time of such arrest, this deponent was actually employed by his
excellency ——— ambassador ——— in the capacity of ———
to his said excellency, and at his special instance, and on his retainer.
And this deponent further saith, that at the time of his said arrest at
the suit of the said plaintiff as aforesaid, this deponent was not a
trader, nor carrying on trade or business, nor was this deponent, at
the time of such his arrest as aforesaid, within the meaning, or an
object of the several statutes made and now in force concerning bank-
rupts, nor of any or either of them.

Sworn, &c.

(Signed.)

General observa-
tions.

K. B. C. P.

AMENDMENT. As a general practical maxim, almost without
exception in both courts, it is laid down, that amendments of all
judicial proceedings, while they shall be yet on paper, may be
made at the instance of either party, at any time pending the suit.
Havers v. Bannister, 1 *Wils.* 7. *Low v. Newland*, *ib.* 76. *Waters v. Bovell*, *ib.* 223.

For practical purposes it may be sufficient to observe that the
different courts have relaxed much of the rigid precision which
anciently, and in some cases until lately prevailed in relation to the
formal statement of judicial acts.

While pleadings were oral, committed to writing and en-
rolled at the very time of allegation, a great degree of strict-
ness in adhering to whatever had been once alleged, whether of
fact or of form, was necessary for the due administration of the then
less perfect modes of dispensing justice. Whatever matter of
plea the court had recorded, could not be altered without in some
measure weakening the authority of the testimony as to what had
passed; the court could not record against its own enrolment,
4 *Inst.* 255. *Gilb. C. P.* 107, and thus the severity which the

general interest of the suitor then required to be most scrupulously observed, will not be too readily condemned. In matters of record at the present period, the courts themselves record little previously to the judgment; and even the judgment has ceased to be worded as in ancient times by their own especial officer; the practitioner, therefore, will perceive the justness of the language of Lord Mansfield, who, on a question of some formal amendment after verdict said, "One is ashamed and grieved that such objections remain." *Sayer v. Pocock*, *Comp.* 467.

Whatsoever pleading, form, or proceeding, hath been decided to be amendable, and when and on what terms, will be now subjoined in alphabetical series by way of table; but those points and observations which do not readily fall into that mode of arrangement, will be prefixed.

It seems, that the court will always take care, that if one party obtain leave to amend, the other shall not be thereby prejudiced. *Alder v. Chipp*, 2 *Burr.* 756, and that all rules to amend are made on payment of costs. *Loft*, 155.

It was said in *Rex v. Corporation of Grampound*, 7 *T. R.* 699, that all amendments are within the discretion of the court, and are allowed in furtherance of justice under the peculiar circumstances of the case; and whether civil or criminal the proceedings are alike amendable. *The King v. Hill Darley*, 4 *East*, 174.

Where a plaintiff had been nonsuited at nisi prius on the ground of a trifling variance between the contract set out, and that proved, the court granted a new trial, with leave to amend the declaration generally on payment of costs, with leave for the defendant to plead *de novo* or demur. *Williams v. Pratt*, 5 *B. & A.* 896.

And where amendment of an entry of a recognizance might have been necessary in order to cure a supposed irregularity as to the venue in a declaration thereon, yet as the defendant had submitted to the process alleged to be irregular, and had perfected bail thereon, C. P. held the defendant waived the objection, and that therefore the amendment was unnecessary. *Hartley v. Hodson*, 1 *J. B. Moore*, 514. And see where the same objection was moved in arrest of judgment, *S. C. Id.* 66.

Although the practice as to amendment be in general the same in both courts, it is material to observe, that in C. P. after every amendment of declaration, a new four-day rule to plead is necessary. *Blunt v. Morris*, 2 *Bl.* 785.

C. P. has resisted application for amendment of mistake in the proceedings in a writ of right; see same in the following arrangement:

After a rule for a new trial pleas not allowed to be struck out. *Parker v. Ansell*, 2 *Bl.* 920.

After argument on a demurrer to a declaration against defendants in their own right, but who appeared to be acting in the disposition of the testator's effects, C. P. refused leave to amend. *Noble v. King*, 1 *H. Bl.* 34.

Where defendant pleaded three pleas, and plaintiff amended and demanded a plea *de novo*, the first three pleas were re-delivered without a second application to the court, (for liberty to plead several

General terms on which amendments are allowed.

Rules to amend granted on payment of costs.

Amendments are in the discretion of the court.

Where plaintiff allowed to amend after nonsuit.

Where need not amend.

A distinction as to amendments in each court.

C. P.

Where pleas not struck out.

Where amendment refused.

Where defendant may re-deliver same pleas without leave.

C. P.

Where defendant not entitled to plead *de novo*.

matters,) and plaintiff for such omission signed judgment, but it was set aside; for defendant is not bound to vary a first defence. *Wilcox v. Sharp*, *Bar.* 273.

An amendment of the plaintiff's declaration does not necessarily entitle the defendant to plead *de novo*, but only where the amendment alters the state of the defendant's case. *Woodroffe v. Watson*, 6 *Taunt.* 400.

All Rules for amending pleadings are *nisi*.

Alphabetical Arrangement of Pleadings, &c. as to which amendments have and have not been allowed.

ACTION. Leave given to change the action from assumpsit to debt for money had and received upon the 7 *G. II. c. 8.*; the Stock-Jobbing act. *Billing and Another, assignees, &c. v. Flight*, 6 *Taunt.* 419, and this, after six terms. *Id. ib.* See also, *Id.* 422. But refused where the action was bailable. *Levett v. Kibblewhite*, 6 *Taunt.* 483, although it should seem that if an exoneretur were entered against the bail, the amendment would be allowed, *Id. ib.*

AVOWRY. Three avowries were added after issue joined on payment of costs, rejoining gratis, and taking short notice of trial. *Dryden, clerk, v. Langley*, *Bar.* 22; where avowry is amended after demurrer, it must be on payment of costs. *Harry v. Bant*, *Id.* 8; but where argument had been had on the merits of an avowry, and rule for further argument, an amendment affecting the merits was denied. *Woodman v. Inwen*, *ib.* 9.

BAIL-PIECE may be amended by inserting the true return mentioned in the writ. *Welland v. Pitts*, *Bar.* 4, and also in misnomer. *Anderson v. Noah*, 1 *Bos. & Pul.* 31; *Crofts v. Coggs*, 4 *J. B. Moore*, 65; but where it was moved to amend the bail-piece in error by enlarging the penalty in order to defeat an execution, it was refused. *Read v. Cooper*, 5 *Taunt.* 320.

BILL. In *Russell v. Martin*, *Str.* 583, leave was given to file a new bill to amend by; and after verdict declaration was amended by the bill, *Wilder v. Handy*, *Id.* 1151.

— on the file may be amended at any time before plea pleaded during the term of which it is filed, but not afterwards without leave of the court, *N. on R. M.* 10 *G. II. Reg.* 2, but with leave of the court on special cause shewn. *Executors of the Duchess of Marlborough v. Widmore*, cited in 1 *Wils.* 159. *Str.* 89. See tit. DECLARATION, in this table, *post*.

BILL OF MIDDLESEX filed of record, amended, as of 24 instead of 25 *G. III.* *Green v. Rennet*, 1 *T. R.* 782. and in a bill of Middlesex the "plea of trespass" to be inserted. *Cox, q. t. v. Mundy*, 1 *Bl. Rep.* 462. And see tit. WRIT, in this table, *post*.

BILL AGAINST AN ATTORNEY amended on payment of costs, by inserting a special memorandum of the day of filing the same after writ of error brought. *Dickinson v. Plaisted*, 7 *T. R.* 474.

CAPIAS, SPECIAL allowed to be amended in order to ground an application to the Master of the Rolls for a new original, *Carr v. Shaw*, 7 *T. R.* 299. and, where there was nothing to amend by, the Christian names of two defendants. *Rutherford v. Mein and Others*, 2 *Sm. R.* 392.

Proceedings, &c.
in which amend-
ment allowed or
not.

CAPIAS AD RESPONDENDUM allowed to be amended in Christian name where bail bond had been given by the right name, and where affidavit of the debt named the defendant rightly. *Stevenson v. Danvers*, 2 *Bos. & Pul.* 109. A *testatum capias* returnable on a day certain instead of a general return day, was not allowed to be amended on account of the bail. *Inman v. Huish*, 2 *N. R.* 133. *aliter*, on serviceable process. *Walker v. Hawkey*, 1 *Marsh.* 399.

There were not fifteen days between the *teste* and return of the *capias*, but amendment was allowed. *Davis, one, &c. v. Owen and Another*, 1 *Bos. & Pul.* 342.

— may be amended as to plaintiff adding as another plaintiff an obligee in the bond. *Tabrum v. Tenant*, 1 *Bos. & Pul.* 481.

CA. SA. or Capias ad Satisfaciendum. The cases are very numerous in which amendments of this writ as to form, have been allowed to be made by the judgment roll after having been executed. *Brown v. Hammond*, *Bar.* 10. *Hunt v. Kendrick*, 2 *Bl. R.* 836. *Laroche v. Wasbrough and Another*, 2 *T. R.* 737. A *testatum ca. sa.* also. *Shaw v. Maxwell*, 6 *T. R.* 450. And amendment allowed on shewing cause against a rule *nisi* for setting *ca. sa.* aside, on payment of costs, and defendant to bring no action. *Stevenson v. Castle*, 1 *Chit. R.* 349. And see *Id.* 350. n. But it appears that in C. P. the motion to amend must be made before the time for shewing cause. *Id. ib. n.* The sum mentioned in the writ was allowed to be amended with costs, even after motion to discharge one of the defendants. *Laroche v. Wasbrough and Another, ubi supra.* The name also of a dead defendant was allowed to be struck out where *ca. sa.* had been executed without costs. *Newnham and Another v. Law*, 5 *T. R.* 577. So, where in the writ the name of John was inserted instead of that of James. *Mackie v. Smith*, 4 *Taunt.* 332. *S. P.* 1 *Chit. R.* 50. n.

CAPIAS PER CONTINUANCE. If tested on the same day as the original *capias*, a new original *capias* may issue though it be tested before cause of action accrued. *Davis, one, &c. v. Owen and Another* 1 *Bos. & Pul.* 342.

CERTIORARI. Amended in the return, *Rex v. Atkinson*, 4 *East*, 175. n.; but it is doubted whether the writ itself can be amended. *Masters v. Ruck, Barnes*, 12.

COMMITTITUR made out by clerk of judgments amendable. *Gage and Another v. Parsons*, *M.* 26 *G. III.* 1 *Tidd*, 372.

CONCORD. See tit. **FINE**, in this table, *post*.

When copy writ not amendable. *Sutherland v. Tubbs*, 1 *Chit. Rep.* 320. n.

Proceedings, &c.
in which amend-
ment allowed or
not.

CONTINUANCES after the term are amendable at common law. *Phillips v. Smith*, 1 *Str.* 139, and may be entered after verdict. *Doe, d. Mears v. Dolman and Others*, 7 *T. R.* 618.

COPY WRIT not amendable. *Sutherland v. Tubbs*, 1 *Chit. R.* 320. n.

COVENANT, Writ of. A writ of covenant cannot be transferred from one county to another, nor can parishes comprised in wrong counties be transposed to the right counties. *Gill*, plaintiff, *Yeates and Wife and Another*, defendants. But additional parishes in the same county may be inserted where it is seen by a clear relation, that land in those parishes was intended to pass. *Id. ib.*

DECLARATION after entry, if the roll be not defaced, amendable by order on payment of costs, or giving an imparlance at plaintiff's election. *K. B. R. M.* 1654, s. 13, but if in form only, before entry and after general issue, without costs or imparlance, *R. M.* 10 *G. II. reg.* 2. (b.) if in substance, or after general issue, or special plea, plaintiff must pay costs or give an imparlance at the election of the defendant. *Executors of the Duchess of Marlborough v. Widmore*, 2 *Str.* 890. The election to pay costs or grant imparlance ruled to be in defendant. *Leehill v. Sir Thomas Reynell*, 2 *Str.* 950.

And, where in a penal action, it was held that a judge's order to amend the bill and declaration by substituting the true name, was good, and that after such amendment there was no irregularity, see *Mestaer, q. t. v. Hertz*, 3 *M. & S.* 450, and tit. **MISNOMER**, *post*.

After amendment the same term, no new rule to plead is necessary, and defendant has two days to plead after amendment and payment of costs. *N. on R. M.* 10 *G. II.* (b.) *Yates v. Edmonds*, *T.* 35 *G. III.* 1 *Tidd*, 740, but if the amendment be of a different term from that of the first rule to plead, a new one will be necessary. 1 *Salk.* 517, 518. 520.

But as noted previously in *C. P.* after amendment, a new four-day rule to plead is always necessary. *Blunt v. Morris*, 2 *Bl.* 785. A declaration in ejectment in certain cases amendable in notice. *Doe, d. Bass v. Roe*, 7 *T. R.* 469.

Formerly after plea pleaded or after the end of the second term, plaintiff could not, under pretence of amending, add a new count to his declaration. *Aubeer v. Barker*, 1 *Wils.* 149. *S. P.* recognized in *Waters v. Bovell*, *id.* 223. *Nisbett v. Griffiths*, *Say. R.* 97. *Savery v. Serle*, *ib.* 150. *Tourville v. Poney*, *ib.* 172.

But executors who had declared on a promise made to their testator were allowed to amend by stating the promise to have been made to themselves in order to save the statute of limitations. *Aubeer v. Barker*, 1 *Wils.* 149, recognized in *Cope v. Marshall*, *Say. R.* 235, 6.

But the practice is, that a count may be added after two terms on payment of costs, and the case of *Garway v. Stevens*, *Bar.* 19, is also an authority for the practice being as above-stated, notwithstanding the cases cited. See also *Frean*

In *K. B.* no new
rule to plead ne-
cessary the same
term, but in

C. P. a new four-
day rule to plead
must be given
after every
amendment.

and Another, Assignees, &c. v. Cooper, 2 *Marsh.* 59. 6 *Taunt.* 752. S. C. where counts were allowed to be added after two terms: but then in such additional counts no other cause of action was proposed to be inserted. And the same practice is recognized, *Brown v. Crump*, 6 *Taunt.* 38. Proceedings, &c. in which amendment allowed or not.

DECLARATION. Amendment of declaration after arrest of judgment on payment of costs, refused. *Collins v. Gibbs*, 2 *Burr.* 899.

See where a declaration in assumpsit under the Stock-Jobbing Act, 7 G. II. c. 8, was allowed to be changed from assumpsit to debt, *Billing, assignee, &c. v. Flight*, 2 *Marsh.* 124; but where the plaintiff had declared upon a process sued out in debt, amendment by changing the declaration from case to debt was refused. *Levett v. Kibblewhite*, 2 *Marsh.* 185.

The court will, at the instance of a defendant, order a declaration to be entitled *specialty* to enable him to plead a tender. *Smith v. Key*, 1 *Str.* 638. *Thompson v. Marshall*, 1 *Wils.* 304, but not in a penal action, in order to bring it within the time limited by the action. *Woodroffe v. Williams*, 1 *Marsh.* 419; and it may be amended by entitling it the day on which it was actually delivered. *Coutanche v. Le Ruez*, 1 *East*, 133. If entitled wrongly it may be amended on affidavit. *Symonds v. Parmenter*, 1 *Wils.* 78. *Dickinson v. Plaisted*, 7 *T. R.* 474.

may be amended even in the case of a prisoner after plea in abatement after the second term. *Owen v. Dubois*, 7 *T. R.* 698. Defendant who was executor sued as administrator; amendment allowed. *Brown v. Shipman*, *Bar.* 5.

amended by bill after verdict, *Wilder v. Handy*, 2 *Str.* 1151, and by increasing the damages after verdict, setting it aside, and granting a new trial. *Tomlinson v. Blacksmith*, 7 *T. R.* 132.

in partition; amended by striking out an erroneous description of the quality of the estate conveyed to the different parties. *Barker and Wife and Others v. Daniel and Others*, 1 *Marsh.* 527. S. C. 6 *Taunt.* 193.

on *scire facias* against bail who had not surrendered principal in time, though principal then in custody, not allowed to be amended. *Stevenson v. Grant and Another*, 2 *N. R.* 103.

may be amended after demurrer on payment of costs. *Taylor v. Bramble*, *Bar.* 6, if demurred to, plaintiff may amend declaration before judgment, though after argument. *Bishop v. Stacey*, *Str.* 954. *Giddins v. Giddins*, cited in *Robinson v. Raley*, 1 *Burr.* 321. *Farmer v. Burton*, *Bar.* 9. *Solomon v. Lyon*, 1 *East*, 370. 1 *Tidd*, 742, and before trial of issues, *Robinson v. Raley*, *ubi supra*, 321; but not after verdict on issues and contingent damages found on demurrer, *ib.* 316; nor after the court have given their opinion on argument on demurrer. *Hamilton v. Wilson*, 1 *East*, 391. *Aber-*

Proceedings, &c.
in which amend-
ment allowed or
not.

Crombie v. Parkhurst, 2 *Bos. & Pul.* 482. *Hosier and Another v. Lord Arundel*, 3 *Bos. & Pul.* 11, 12; and after party has once amended on demurrer, he cannot amend on a second demurrer. *Kinder v. Paris*, 2 *H. Bl.* 561.

After demurrer and joinder either party may amend their pleadings. *Anon.* 2 *Salk.* 520. *Hatton v. Walker*, 2 *Str.* 846.

DECLARATION may be amended after error in a clerical mistake, upon which the defendant relied for error. *Moody v. Stracey*, 2 *Taunt.* 588.

DEED to lead the uses of a recovery cannot be amended. *Steele*, demandant; *Clennell*, tenant; *Benn*, vouchee; 6 *Taunt.* 145.

DEMURRER cannot be withdrawn after trial and verdict. *Robinson v. Raley*, 1 *Burr.* 316, but may be withdrawn after argument, and the party allowed to plead *de novo*, in order to try on the merits. *Ayres v. Wilson*, *Doug.* 385. *Waters v. Ogden and Another*, administrators, *ib.* 452. *Giddins v. Giddins*, *Say. R.* 316. In this last case no cause was shewn.

_____ cannot be withdrawn after opinion of the court pronounced. *Saxby v. Kirkus*, *Say. R.* 116, 117.

DISTRINGAS. The *distringas* in debt was *de placito*, with a blank, omitting *debiti*, and after verdict held amendable. *Bullock v. Parsons*, 2 *Ld. Raym.* 1143.

EJECTMENT. See this title, *post*.

ENTRY, WRIT OF. In levying a fine not allowed to be amended by the insertion of the word "tithes;" that word being omitted in the release, although appearing in the deed to lead the uses of the fine. *Phillips v. Jones*, 3 *Bos. & Pul.* 362, but in a writ of entry in recovery, a new parish was allowed to be inserted upon affidavit of the parties, and by consent of all parties interested at the time. *Wheeler*, demandant; *Hill*, tenant; *Heseltine and Another*, vouchees, 2 *Bos. & Pul.* 560. An amendment on the same principle permitted, where tithes were allowed to be inserted in the proceedings; the word "hereditaments" appearing in the deed to lead the uses. *Cowie*, demandant; *Lloyd*, tenant; *Reeve*, vouchee, *ib.* 578. But at all events neither the teste nor the return of the writ of entry is amendable, where it is not the misprision of the clerk, unless there is something to amend it by. *Wynne v. Thomas*, *Willes R.* 563. In the case of *Hind*, demandant; *Milne*, tenant; _____, vouchee, the return of writ of entry was amended by adapting it to the time of taking the acknowledgment, 5 *Taunt.* 259. But amendment of the disseisor's name in a writ of entry, *sur disseisin en le post*, was refused. *Hull v. Blake*, 4 *Taunt.* 572. See tit. **RECOVERY**, *post*.

ERROR, Writ of Error. See tit. **WRIT OF ERROR**, *post*.

FI. FA. or Fieri Facias, Writ of, may be amended by inserting a *testatum* clause, though it should appear that the second writ were returnable before judgment signed; but the court held that the judgment related to the first day of the term. In this case the first writ had issued into a different county

from that where the venue had been laid. *Meyer v. Ring*, 1 *H. Bl.* 541. It seems to be the established practice to allow amendments of these writs. *Cowperthwaite v. Owen*, 3 *T. R.* 657. *Fi. Fa.* was amended in the return by the award of execution on the roll. *Atkinson v. Newton*, 2 *Bos. & Pul.* 336; and "before the king's justices at Westminster," allowed to be inserted instead of "before us." *Simon v. Gurney*, 1 *Marsh.* 237. *S. C.* 5 *Taunt.* 605. But the court refused to allow plaintiff to amend a *fi. fa.* where the defendant had become bankrupt before the sale of goods taken under it. *Hunt v. Pasman*, 4 *M. & S.* 329.

Proceedings, &c.
in which amend-
ment allowed or
not.

FINE. The court are not induced to amend fines by the difficulties raised by purchasers. 6 *Taunt.* 162.

In a fine passed two years before, the court refused to allow the surname of the deforciant to be altered, though it was sworn that the insertion of the wrong name was by mistake. *Ex parte Motley and Ux.*, 2 *B. & P.* 455. See also the cases referred to in the notes, *Ib.* 456. And the court also refused to amend the fine by increasing the quantity of each species of land, so as to make each cover the whole quantity intended to be conveyed. *Bartram and Another*, plaintiffs; *Towne and Another*; defendants, 6 *Taunt.* 58. So also to amend the concord by the writ of covenant as to the number of messuages. *Clutterbuck v. Brabant*, 1 *Marsh.* 406. *S. C.* 6 *Taunt.* 1. So also by inserting an additional parish where the deeds passed lands in any contiguous towns. *Cotterill*, plaintiff, *Franklin and Wife*, defendants, 6 *Taunt.* 284.

Cases of amendment, by insertion of real instead of mistaken christian names, *Grey*, plaintiff, *Wainright and Wife*, and others, defendants, 1 *Marsh.* 578; of an advowson, *Manley*, plaintiff, *Tattersall and Wife*, defendants, 4 *Taunt.* 257; of a parish, *Lambe*, plaintiff, *Reaston and Wife*, defendants, 5 *Taunt.* 247. *Cooke*, plaintiff, ———, defendant, 4 *Taunt.* 644. *Ib.* 798. *Rowlett and Marriot*, plaintiffs, *Orlebar*, defendant, 1 *Marsh.* 452. 6 *Taunt.* 73. *Frost*, plaintiff, *Hall and Wife*, defendants, 2 *Marsh.* 391. *Dobson and Others v. Dewar*, 1 *Brod. & Bing.* 15.

Amended also by striking out the names of parishes in which lands were erroneously described to be situated, those lands being extra-parochial. *Prime and Another*, plaintiffs, *Garrick and Wife*, defendants, 1 *Marsh.* 468. See also where two fines of different shares in the same lands were amended by stating them to be situated in A. instead of "in the parish of B.," there being no such parish. *Shelly*, plaintiff, *Miller and Wife*, defendant, 1 *Marsh.* 519. 6 *Taunt.* 162. *S. C.* And in a fine of a rent charge, lands were substituted for those erroneously inserted in the fine. *Carey*, plaintiff, *Sir Richard Bedingfield and Wife*, defendants, 6 *Taunt.* 276.

But a fine cannot be amended without an affidavit connecting the fine with the deed produced to warrant the amendment. *Fawcett*, plaintiff, *Lowe*, defendant. See tit. ENTRY, WRIT OF, in this table, *ante*; and FINE, *post*.

Proceedings, &c.
in which amend-
ment allowed or
not.

AMENDMENT; CASES.

FORMEDON. All the proceedings in Formedon were amended; but by consent and on payment of the costs in an ejectment, and also in the Formedon. *Scot v. Perry*, 3 *Wils.* 206, and where error was brought on a judgment in Formedon for error in original, the original was allowed to be amended. *Freem. R.* 39.

INFORMATION ats. Attorney-General on statutes amendable. *Rex v. Holland*, 4 *T. R.* 457. 458.

INQUIRY, WRIT OF. If the award of the writ of inquiry be right, the *teste* of the writ, if wrong, may be amended by it. *Johnson v. Toulmin*, 4 *East*, 173. and this writ may be amended by the record of the judgment by default, *ib.*

ISSUE. In debt, where bond was misrecited, the issue was amended on payment of costs. *Walpole v. Robinson*, *Cooke's R.* 26.

— On *nul tiel record* amended by the *scire facias*. *Hamson v. Chamberlaine*, *Cooke's R.* 76. *S. C. Barnes*, 3.

— May be amended as to the venue where action was brought on a statute. *Cook v. Shone and Others*, *Bar.* 488. but not where the action is not brought on a statute. *Bearcroft v. Hundred of Burnham*, *ib.* 19.

JUDGMENT. The judgment was amended by altering the name of the attorney in the warrant, so that in the declaration in a penal action, after error brought, and the variation having been assigned for error. *Richards, q. t., v. Brown*, *Doug.* 114. In *Wright v. Canning*, 2 *Stra.* 807. the writ of error itself was ill. See *Doe v. Pilkington*, 4 *Burr.* 2447. and the cases there cited. Also where it appeared by the record that verdict had been given on the first issue, and no notice taken of the last, after error and joinder in the House of Lords, the court allowed amendment by the judge's notes, on payment of costs, *Petrie v. Hannay*, *Bart.* 3 *T. R.* 659.

But where a defendant is entitled to treble costs by a judge's certificate, under a statute, and the judgment is entered up for treble costs generally, without stating on what ground the defendant is entitled to them, this is a substantial defect, and the court will not amend the judgment by striking out the word "treble." *Dunbar v. Hitchcock*, 1 *Marsh.* 382. But K. B. afterwards allowed the amendment to be made on payment of costs, the amount of which, errors having been assigned in the House of Lords, was very great; yet the officer who drew up the original judgment had, it was said, previously drawn up several without its appearing on record why treble costs were adjudged, and no objection taken. This case may operate as a caution in framing judgments not occurring in ordinary practice. See 3 *M. & S.* 591.

So, where a verdict was given for a sum exceeding the damages in the declaration, and judgment entered for the same, and writ of error upon the judgment, assigning that for cause, the court allowed the plaintiffs to amend the judgment and transcript, in a term subsequent to that in which judgment was

signed, by entering a *remittitur* for the excess. *Usher and Another v. Dausey and Others*, 4 *M. & S.* 94. Proceedings, &c. in which amendment allowed or not.

JUDGMENT entered by clerk against executors *de bonis propriis* allowed to be amended *de bonis testatoris*, even if the record be sent back from the Exchequer Chamber. *Green v. Rennet*, 17 *T. R.* 783; but where an executor pleads a false plea, of judgment recovered against himself, on which, judgment is entered up against him for the debt and damages *de bonis testatoris*; and words are afterwards interlined on the judgment-roll, by which the judgment *de bonis propriis* is confined to the damages only, the court will not, on motion, strike out the words which had been interlined, it not appearing by whom the interlineation had been made, and the judgment being of six years standing. *Burroughs v. Stephens and Others*, executors, &c. 1 *Marsh.* 211. *S. C.* 5 *Taunt.* 554. and in another case, and under special circumstances, the judgment was amended as to time, to what period the same should relate back. *Mara v. Quin*, 6 *T. R.* 1. likewise in replevin, where the defects of a verdict were supplied by allowing defendant in replevin to enter a judgment *pro retorno habendo* after a writ of error brought. *Rees v. Morgan*, 3 *T. R.* 349.

So, in error in the Exchequer Chamber, and the error assigned was, that the damages were not said to be awarded *ex assensu suo*, K. B. amended the record of the original judgment. *Tully v. Sparkes*, 2 *Str.* 867, and the cases of judgment being allowed to be amended *after error* brought, so long as diminution may be alleged, and a *certiorari* awarded, are numerous. See *Hardy, q. t. c.* Cathcart, clerk, where, after error, in a penal action, the plaintiff was allowed to enter a *remittitur* of the damages. 1 *Marsh.* 180.

See tit. EXECUTOR AND ADMINISTRATOR, *post*.

MANDAMUS not amendable after return. *Rex v. the Mayor, &c. of Stafford*, 4 *T. R.* 689.

NOTICE at the bottom of declaration in ejectment allowed to be amended. *Doe, d. Bass v. Roe*, 7 *T. R.* 469.

ORIGINAL WRITS amendable in misprisions of the clerk, &c. by 8 *H. VI.* c. 12.

PANEL, PLEA, PROCESS. These are named in the following statutes as being amendable in clerical mistakes or misprisions of the clerks, 14 *E. III.* c. 6. 8 *H. VI.* c. 12. 15.

PAPER-BOOK. Neither party may amend it without leave. *Clements v. Stirling*, 1 *Chit. R.* 336.

PARTICULARS, BILL OF, delivered under a judge's order, may be amended after nonsuit on account of a defect in them on payment of costs. *Holland v. Hopkins*, 2 *B. & P.* 245.

PENAL ACTIONS. The decisions in which it has been held that the proceedings are amendable at common law in penal actions are numerous; but the court will not allow the charge to be altered. *Mace, q. t. v. Lovett*, 5 *Burr.* 2833. Bon-

Proceedings, &c.
in which amend-
ment allowed or
not.

field, *q. t. v. Milner*, 2 *Burr.* 1098. *Cross v. Kaye*, 6 *T. R.* 543. *Maddock, q. t. v. Hammett*, 7 *Id.* 55. nor where the amendment sought was to alter the term, to bring it within the time limited by the statute for bringing the action. 1 *Chit. R.* 45. n. nor where the action had been four years depending, though the proceedings were yet in paper. *Goff v. Popplewell*, 2 *T. R.* 707. nor if the plaintiff has unnecessarily delayed the cause can he amend. *Steel, q. t. v. Sowerby*, 6 *Id.* 171. *Ranking and Another, q. t. v. Marsh, Knt.* 8 *Id.* 30. See tit. DECLARATION, in this Table, *ante*.

PLEA. Amendment of after two terms, allowed. *Waters v. Bovell, Wils.* 223.

— formerly could not be amended after demurrer if plaintiff had lost a trial. *Jordan and Twells, Rep. Temp. Hardw.* 171. But see *Alder v. Chip*, 2 *Burr.* 755. and the practice is now otherwise, *Anon. 2 Salk.* 520. *Gilb. C. P.* 114. 115, but if the court have given their opinion upon the demurrer, amendment is refused. *Solomons v. Lyon*, 1 *East*, 370.

— in *Abatement* cannot be amended. *Dockary v. Lawrence, Cooke's R.* 29.

POSTEA. After a general verdict had been found on a declaration containing good and bad counts, and evidence as to the good counts had been only given, the court allowed the *postea* to be amended. *Eddowes and Another v. Hopkins and Another, executors, &c. Doug.* 376. So in *C. P. Williams v. Breedon*, 1 *B. & P.* 329. 2 *Saund.* 171. a.

So the *postea* on special verdict may be amended on affidavit. *Mayo v. Archer*, 1 *Str.* 514, or on judge's notes, *Newcomb v. Green*, 2 *Str.* 1197, and that after error brought, *Doe, d. Church v. Perkins*, 3 *T. R.* 749, or on counsel's notes, 1 *Salk.* 47, 48. 53. But the court will not at a distance of time after the trial amend the *postea* by increasing the damages given by the jury, although all the jurymen join in an affidavit stating their intention to have been to give the plaintiff such increased damages, and that they conceived that the verdict they had given was calculated to give him such sum. *Jackson v. Williamson*, 2 *T. R.* 281.

See titles JUDGMENT, VERDICT, *post*.

PROCESS may in general be amended where there is any thing to amend by. 2 *B. & P.* 109. as *precipe*; *Green v. Rennett*, 1 *T. R.* 782.

RECOGNIZANCE of *Bail* was not amended at plaintiff's instance, who in his own name, though a joint obligee in a bond, had arrested defendant and taken recognizance of bail in his, the plaintiff's own name. *Tabrum v. Tenant*, 1 *B. & P.* 481. See also *Venn v. Warner*, 3 *Taunt.* 263, where the defendants had acknowledged to Christian instead of Daniel, and amendment refused; but then the bail swore that the mistake was not made by design on their part. And where it was refused to amend a recognizance, the defendant having waived the irregularity, see *Hartley v. Hodson*, 1 *J. B. Moore*, 514.

RECOGNIZANCE. But where the failure in the record was through the misprision of the officer, the court C. P. allowed it to be amended. *Mann v. Calow and Another*, 1 *Taunt.* 221. See also *Halliday and Another v. Fitzpatrick*, 4 *Taunt.* 875. See tit. *SCIRE FACIAS AGAINST BAIL*, *post*, p. 56.

Proceedings, &c.
in which amend-
ment allowed or
not.

RECORD may be amended, though made up, and the term passed. *Alder v. Chip*, 2 *Burr.* 756. So also after cause called on by a rule made instanter with the consent of the parties. *Murphy v. Marlow*, 1 *Campb.* 57. So after nonsuit for a variance in an undefended action on a replevin bond, the court permitted the record to be amended, and a new trial to be had. *Halhead v. Abrahams*, 3 *Taunt.* 81.

— Plea on record may be amended, even after the same shall have been three years made up. *Skutt v. Woodward*, 1 *H. Bl.* 238.

— Clerical mistakes in record may be amended, except in appeals and outlawries on the same, as expressed in the statutes 14 *E. III.* c. 6. 8 *H. VI.* c. 12. 15. If to a rejoinder, concluding with a verification, plaintiff add a *similiter*, and defendant obtain a verdict, court will amend the record. *Grundy v. Mell*, 1 *N.J.R.* 28. And see 1 *Chit. R.* 277. (n).

— After error brought, special memorandums of the day when bill was filed may be added. *Dickenson v. Plaisted*, 7 *T. R.* 474. *Minchin v. Cope*, 1 *Chit. R.* 45; but defendant was to be at liberty to plead *de novo*.

— Clerk of the errors C. P. may amend his own mistake made in the transcript. *Randolfe v. Bailey*, in error, 1 *M. & S.* 252.

And after error from C. P. into K. B., and from K. B. into Dom. Proc., this court allowed an amendment to be made in the record, by inserting the certificate of the judge who tried the same, allowing the plaintiffs treble costs which had been omitted by the clerk in entering judgment in C. P.; also by inserting the true term in which the assignment of errors and joinder were made, instead of an entry by a clerk on the judgment roll of K. B., that they were made on an impossible day in another term, although both these errors were assigned for cause in Dom. Proc. *Dunbar v. Hitchcock*, 3 *M. & S.* 591.

— Amended by an amended caption on an indictment. *Rex v. Atkinson*, 4 *East*, 176. n.

RECOVERY cannot be amended on affidavit, but it must appear on the face of the deed to lead the uses that there is ground for amendment. *Pearson, demandant, Pearson, tenant, Broughton, vouchee*, 1 *H. Bl.* 73. But by the deed to lead the uses recovery may be amended. *Cross, demandant, Grey, tenant, Pead and Another, vouchees*, 1 *B. & P.* 137. And although the amendment was contested, an advowson omitted in the recovery was allowed to be inserted, the deed to lead the uses having the word "hereditaments," and the

Proceedings, &c.
in which amend-
ment allowed or
not.

intention to pass the advowson also appearing, *Millbanke v. Jolliffe*, 2 B. & P. 580. n.; but where a parish was not named in the deed to make a tenant to the precipe, it was not allowed to be inserted as an amendment in the recovery, *Clutterbuck, demandant, Debary, tenant, Langton, vouchee*, 2 *Taunt.* 96; but in a subsequent case the court allowed one parish to be substituted for another, although the deed to make the tenant to the precipe described the premises merely as lying in the parish proposed to be expunged. *Flower v. Bainwright*, 5 *Taunt.* 303.

RECOVERY. The name of the husband of a vouchee, who is a feme covert, not allowed to be inserted in the recovery. *Parson, demandant, Abbot, tenant, Knight and Others, vouchees*, 1 *Taunt.* 478. Where a rent charge which had long been treated as merged in the land by unity of possession was omitted in the recovery, the court allowed it to be inserted. *Brett, demandant, Smith, tenant, Honeywood, Bart. vouchee*, *Id.* 484. So also by inserting a messuage recently built upon part of the premises. ———, demandant, *Shaw, tenant, Hawkins, vouchee*, 3 *Taunt.* 74.

So also by inserting tithes and tenths on affidavit of the seisin of the vouchee. *Suncox, demandant, Wakeford, tenant, Marshal, vouchee*, 4 *Taunt.* 155.

So also by inserting more acres of land, there being an excess of acres of wood and meadow, and too few of land. *Strong, demandant, Still, tenant, Drake, vouchee*, 4 *Taunt.* 155. See also *Alexander, demandant, Bleasdale, tenant, Stanford and Wife, vouchees*, *Id.* 734.

So also by inserting a parish marked in a map in the margin of the deed declaring the uses. *Baxter, demandant, Baxter, tenant, Newman, vouchee*, 4 *Taunt.* 249. See also *Sidney, demandant, Hulme, tenant, Austin and Another, vouchees*, 6 *Taunt.* 177. Where other insertions allowed, see *Collier, demandant, ———, tenant, Lord Chesterfield, vouchee*, 4 *Taunt.* 226. *Colville, demandant, Denison, tenant, Acton, vouchee*, *Id.* 749. *Jacob, demandant, ———, tenant, Duke of Devonshire, vouchee*, *Id.* 737. *Rashleigh, demandant, Lee, tenant, Smith, vouchee*, *Id.* 855. *Sidney, demandant, Hulme, tenant, Austin and Another, vouchees*, 1 *Marsh.* 532. But it must be irresistibly clear, that the land in parishes moved to be inserted was intended to be passed. *Kinderley, demandant, Domville, tenant, Sir C. W. Bamfylde and Another, vouchees*, 4 *Taunt.* 738. And therefore where tithes did not appear in the deed to lead the uses, amendment by inserting them was refused, *Garle, demandant, Oram, tenant, Mason, vouchee*, 2 *Marsh.* 194; nor by striking out "a portion of tithes," and substituting "all the tithes." *Ross, demandant, Willshen, tenant, Woge, vouchee*, *Id.* 195. But according to the report of the same case, 6 *Taunt.* 489, the insertion of the great tithes to the whole estate was allowed. Nor by striking out the aggregate sum of several rents, and inserting the different rents or sums of which it was composed, *Dom-*

vile, gent. demandant, Kinderley, gent. tenant, Earl of Coventry, vouchee, *Id.* 264; nor by adding the name of one of the parties which had been omitted in the warrant of attorney. Fox, demandant, Beubow, tenant, Earl Gower, vouchee, 2 *Marsh.* 328. 6 *Taunt.* 652. See also Steele, demandant, Clempell, tenant, Benn, vouchee, 6 *Taunt.* 145. Nor can the warrant of attorney be amended, Forster, demandant, Forster, tenant, Bolton and Wife, vouchees, *Id.* 373. Horn, demandant, ———, tenant, Rossiter, vouchee, 4 *Taunt.* 366. Rolfe, demandant, Lacon, tenant, Anguish, vouchee, 5 *Taunt.* 2. Dowse, demandant, Lloyd, tenant, Reeve, vouchee, 2 *Marsh.* 330. And the recovery was amended by transposing the names of the demandant and tenant, Roberts, demandant, Robinson, tenant, 2 *Taunt.* 222. Also by transposing the names of attorney and vouchee, Shaw, demandant, Le Blanc, tenant, Ramsay and Wife, vouchees, 4 *Taunt.* 98. Other cases where transposition allowed, Shepherd, demandant, James, tenant, Boughton, vouchee, *Id.* 226. And also by striking out the voucher of a vouchee, whose acknowledgment was taken without a *dedimus*, Rawlings, demandant, Price, tenant, Tom and others, vouchees, 3 *Taunt.* 59. Other cases where striking out was permitted, Norris *v. Desse*, 5 *Taunt.* 73. Domville, gent. demandant, Kinderley, gent. tenant, Earl of Coventry, vouchee, 2 *Marsh.* 264. And also by inserting an additional christian name, Anon. tenant and demandant, O'Brien, vouchee, 4 *Taunt.* 196.

The description of the premises mentioned in a common recovery was amended, Kinderley, demandant, Domville, tenant, Bamfylde, Bart. and another, vouchees, 1 *Taunt.* 257. All parties were alive and consenting, and affidavits as to the description of the premises were duly made, S. P. Carew, vouchee, *ib.* 355.

And where a recovery may be further amended, see Lancaster, demandant, Wilmot, tenant, Boone, vouchee, 1 *J. B. Moore*, 25.

REPLICATION amended after verdict by adding *similiter*. Sayer *v. Pocock*, *Cowp.* 407.

———— amended after cause had been made a *remanet* for defect of jurors. *Say. R.* 285.

———— may be withdrawn, and plaintiff may reply *de novo* after a lapse of six years. *Alder v. Chipp*, 2 *Burr.* 756.

———— After verdict plaintiff cannot alter replication and reply fraud. *Bank of England v. Morrice*, 2 *Str.* 1002. Nor after nonsuit will the court allow plaintiff to reply *de novo*. *Hutchinson, executrix, v. Brice*, 6 *Burr.* 2692.

———— But after verdict plaintiff will be allowed to add a traverse before *similiter*. *Cooke v. Burke*, 5 *Taunt.* 164.

RETURN. Misprisions of the clerk in returns amendable by 14 *E. III.* c. 6. 8 *H. VI.* c. 12. 15.

———— to a mandamus cannot be amended by setting forth a new constitution. *Rex v. The Corporation of Grampound*, 7 *T. R.* 699.

Proceedings, &c.
in which amend-
ment allowed or
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Proceedings, &c.
in which amend-
ment allowed or
not.

RIGHT, WRIT OF. Demandant not allowed to amend a mistake in Christian name in the count, though clearly appearing on an affidavit to be a mistake. *Charlwood v. Morgan*, 1 N.R. 64. Nor to amend his count by introducing a step in the descent, though sworn to be omitted by mistake. *Baylis v. Manning*, *ib.* 233. But on favorable circumstances to be made out by affidavit, it was said previously to the above cases that the count may be amended. *Dumday v. Sir Robert Hughes*, 3 B. & P. 453.

ROLL. Entry on the roll in the Treasury may be amended. *Rex v. Atkinson*, 4 East, 176. n. *Rex v. Aylett*, *ib.*

RULE OF COURT may be amended on motion.

SCIRE FACIAS AGAINST BAIL. The court of C. P. hath sometimes refused to allow *sci. fa.* against bail to be amended where by such amendment the bail might be deprived of surrendering the principal. *Hodgson v. Mitchell*, Bar. 26, 114. or where the bail are entitled to take advantage of irregularities. *Fulwood v. Annis*, 3 B. & P. 321.

SCIRE FACIAS AGAINST BAIL IN ERROR may be amended by the record of the recognizance. *Perkins v. Petit*, 2 B. & P. 275.

ON JUDGMENT. Writ and declaration thereon ordered to be amended conformably to judgment roll. *Braswell v. Jeco*, 9 East, 316.

TESTE. The teste of a judicial writ is amendable. *Neville v. Bates*, *Yelo*. 64. *Carty v. Ashly*, 2 Bl. 918. *Bouchier v. Whittle*, 1 H. Bl. 291. *Davis, one, &c. and Another v. Owen*, 1 B. & P. 342.

VENIRE may be amended, *Gilb. C. P.* 174.

VENUE, Amendment as to, in an action on Bribery Act allowed. *Petre v. Craft*, 4 East, 433. *Stroud v. Tilly*, 2 Str. 1162. And where refused, see tit. **VENUE**, sect. III. *post*.

VERDICT. In *Spencer v. Goler*, C. P. said a verdict could not be altered unless matter appeared upon the face of it to shew that such alteration would be according to the intent of the jury. See tit. **POSTEA**, in this table, *ante*, page 52.

If verdict be given for a larger sum than the amount of the damages laid in the declaration, and error be brought on that account, court will allow a *remittitur* of the excess on payment of the costs in error. *Pickwood v. Wright*, 1 H. Bl. 643.

The court will rectify the verdict on a penal statute (that of usury) by judge's notes. *Manners, q. t. v. Postan*, 3 B. & P. 343; but where the evidence applied to bad and good counts in the declaration, *Lawrence, J.* said the plaintiff ought not to be at liberty to amend by the judge's notes. *Holt v. Scholefield*, 6 T. R. 693.

Where a verdict was taken generally for the plaintiff, the court refused a motion for leave to enter the verdict on particular counts, according to the evidence on the judge's notes, after a lapse of eight years, and after the judgment had been

reversed in error for a defect in one count. *Harrison v. King*, 1 B. & A. 161.

Proceedings, &c. in which amendment allowed or not.

But verdict cannot be amended on the notes of an arbitrator. *Scougall v. Campbell*, 1 Chit. R. 283.

And although, by the judge's notes, it may, yet the application must be made to the particular judge, and not to the court. *Id. ib.* *Graham v. Bowham*, *Id.* 284. n.

WRIT. Writ cannot be amended without being re-sealed. *Israel v. Middleton*, *Id.* 319. n.

And not by adding the name of another party. *Adamson v. ———*, *Id.* 369. n.

And where there is a mis-joinder of counts, and one count is partly trespass and partly case, and one count is entirely trespass, the verdict may be amended according to the evidence. *Harris v. Davis*, *Id.* 625. n.

Continuances may be entered after verdict. *Doe d. Mears v. Dolman*, 7 T. R. 618.

PRACTICAL DIRECTIONS.

Amendment may be made either by a judge on summons, or by motion. See therefore titles MOTION, SUMMONS, *post*, and the observations at the commencement of the present Title.

AMERCEMENT. Formerly if the sheriff failed in obeying the writs, rules, or orders of the court, he might be *amerced*; but this practice has been superseded by ATTACHMENT, which see.

ANCIENT DEMESNE. See tit. ACCEDAS AD CURIAM, *ante*, and RECORDARE FACIAS LOQUELAM, *post*.

ANNUITY, *Action of*. Now superseded by the action on the covenant or agreement, on which it may be granted.

Three annuity acts, *viz.* stat. 17 G. III. c. 26. stat. 53 G. III. c. 141. and stat. 3 G. IV. c. 92, are now in force; the first, with reference to annuities granted after the passing of that act, and until the passing of the succeeding; the next, with reference to those annuities granted after the act last specified; and stat. 3 G. IV. c. 92. which is merely explanatory of the statute immediately preceding it.

By stat. 17 Geo. III. c. 26. s. 1. "a memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, shall, within twenty days of the execution of such deed, &c. be enrolled in Chancery, which memorial shall contain the day of the month and the year when such deed, &c. bears date, and the names of all the parties, and for whom any of them are trustees, and of all the witnesses; and shall set forth the annual sum or sums to be paid, and the name of the person for whose life the annuity is granted, and the consideration for granting the same, otherwise every such deed, &c. shall be void."

Abstract of stat. 17 G. III. c. 26. s. 4.

And by clause, sec. 3. "in every deed, &c. whereby any annuity or rent charge shall be granted or attempted to be granted, the consideration really and bonâ fide, (which shall be in money only), and also the name or names of the person or persons by

whom and on whose behalf the said consideration, or any part thereof, shall be advanced, shall be fully and truly set forth and described in words at full length; and in case the same shall not be fully and truly set forth, &c. every such deed, &c. shall be void."

And by section 4. "if any part of the consideration shall be returned to the person advancing the same, or in case the consideration or any part of it is paid in notes, if any of the notes; with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled and destroyed without being first paid; or, if the consideration or any part of it is paid in goods; or if any part of the consideration is retained on pretence of answering the future payments of the annuity, or any other pretence; in all or any of the aforesaid cases the person by whom the annuity or rent-charge is made payable may apply to the court in which any action is brought for payment or judgment, entered by motion, to stay proceedings on the judgment or action; and if it shall appear to the court that such practices as aforesaid, or any of them have been used, the court may order the deed, &c. to be cancelled, and the judgment, if any has been entered, to be vacated."

Abstract of stat.
53 G. III. c. 141.

By stat. 53 G. III. c. 141. s. 1. the statute 17 G. III. c. 26. is repealed, except so far as regards any annuities or rent-charges which have been granted before the passing stat. 53 G. III. c. 141.

By s. 2. "within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall, after the passing of the act, be granted for less or more life or lives, or for any term of years or greater estate, determinable on one or more life or lives, a memorial of the date of every such deed, &c. of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same shall be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid shall be inrolled in Chancery, in the form or to the effect specified in the act, with such alterations therein as the nature and circumstances of any particular case may reasonably require, otherwise every such deed, &c. shall be void to all intents and purposes."

The form specified in the statute contains eight columns, headed respectively, (1) Date of the instrument. (2) Nature of instrument. (3) Names of parties. (4) Names of witnesses, and of what place; but see stat. 3 G. IV. c. 92, *post*. (5) Name or names of persons by whom annuity or rent-charge to be beneficially received. (6) Person or persons for whose life or lives the annuity or rent-charge is granted. (7) Consideration, and how paid. (8) Amount of annuity or rent-charge.

By s. 3. "companies may be described by their usual firm or name of trade."

By s. 4. "in every deed, &c. where the person to whom such annuity, &c. shall be granted or secured to be paid, shall not be beneficially interested, the name of the person, &c. intended to

take the annuity beneficially shall be described in the enrolment, otherwise such deed, &c. to be void."

By s. 5. "copies of deeds, &c. shall, on twenty-one days notice being given to the person for the time being entitled to such annuity, unless prevented by fire or accident, be sent to the person by whom the annuity, &c. shall be granted, and requiring the same, who is to pay sixpence per hundred words, and also the reasonable costs of sending or delivering the same; and such person may examine the same with the original. In case of refusal to deliver such copies, any judge of K. B. or C. P. may make an order for the production of the instruments, and for suffering the complainant to take copies thereof, and examine the same or the copies with the originals, and otherwise in the premises as to such judge shall seem meet."

Sec. 6. then states in what cases proceedings against a grantor of an annuity shall be stayed by motion, &c. in the court in which action shall be brought for payment, &c. 1. If any part of the consideration shall be returned to the party advancing the same. 2. If any part of the consideration shall be paid in notes which, with the privity and consent of the person advancing the same, shall not be paid. 3. Or cancelled or destroyed without being paid. 4. Or if consideration expressed to be paid in money, but the same or any part thereof shall be paid in goods. 5. Or if the consideration of any part shall be retained on pretence of answering future payments of the annuity, or any other pretence.

By s. 8. "contracts for the purchase of annuities by persons under age are void, and endeavouring to induce infants to grant annuities is made a misdemeanor, punishable by fine, imprisonment, or other corporal punishment."

By s. 9. "Solicitor, scrivener, broker, and other person taking more than 10s. *per cent.* for soliciting, &c. the loan, &c. guilty of a misdemeanor, and punishable by fine and imprisonment, or one of them, at the discretion of the court. And the person who shall have paid the money, gratuity, or reward, shall be a competent witness."

By s. 10. and last, "The act is not to extend to Scotland or Ireland, nor to any annuity, &c. given by will, or by marriage settlement, or for the advancement of a child, nor to any annuity, &c. secured upon freehold or copyhold land of equal or greater value than the annuity, or secured by actual transfer of stock, the dividends whereof are of an equal or greater value than the annuity; nor to any voluntary annuity granted without regard to pecuniary consideration or money's worth, nor to any annuity granted by any body corporate or any authority or trust created by act of parliament."

By stat. 3 G. IV. c. 92. s. 1. it is declared, that by the statute 53 G. III. *no further or other description* of the subscribing witness or witnesses to any deed, &c. is required in the memorial *besides the names of all such witnesses.*

By s. 2. "every deed, &c., a memorial of which shall have been enrolled pursuant to stat. 53 G. III. notwithstanding the omission to enrol any other deed, &c. shall be valid, notwithstanding

ing a memorial of any other deed, &c. for securing the same annuity shall not have been enrolled pursuant to the act."

By s. 3. "not to give any other validity to any deed, &c. which shall have been enrolled than such deed, &c. would have had if any deed, &c. for securing the same annuity, of which the memorial shall not have been duly enrolled, had never been executed."

By the last section, "the act is not to give effect to any deed, &c. declared void, or to affect any proceedings at law or in equity, commenced and then depending, upon the ground of any defect in the memorial in not describing the witnesses thereto, otherwise than by names, for avoiding any such deed," &c.*

Only practical points should find place here; yet some others will be inserted for the guidance of the attorney as to the general principle upon which the court has interfered upon motion. And although no action shall have been brought for the recovery of the annuity, yet the court, in virtue of its general jurisdiction, will inquire into the validity of a warrant of attorney or judgment; and if the statute have not been observed, the warrant of attorney will be vacated, or the judgment set aside. *Ex parte* Chester, 4 T. R. 694. *Haynes v. Hare*, 1 H. Bl. 659. *Steadman v. Purchase and Cox*, 6 T. R. 737. *Van Braam v. Isaacs*, 1 B. & P. 451.

But where a warrant of attorney was given to enter up judgment in C. P. and by mistake it was entered up in K. B., this court would only vacate the judgment. 6 East, 241.

There is some discrepancy between the cases upon the point whether the court will or not interfere to set aside or cancel *all* the deeds, &c.; but the more recent decision upon it is, that *only* the deed which is defective in itself, or in its memorial will be set aside. *Brown v. Rose*, 1 Marsh. 478. 6 Taunt. 124. S. C. And see *Ex parte* Chester, 4 T. R. 694. The opposing cases are noted in 1 Tidd, 511.

What the memorial should contain, under stat. 53 G. III. c. 141.

It does not seem expedient in this place to state the few points which have been determined upon statute 53 G. III. c. 141. those being referable to matters of description of the interests of the parties or of the nature of the securities. See *Barber v. Gamson*, 4 B. & A. 28. *Yems v. Smith*, 3 Id. 206. or as to the consideration, *Drake v. Rogers*, 4 J. B. Moore, 402.

Objections must be inserted in the rule nisi.

When a rule to shew cause is obtained in King's Bench, the several objections to the annuity intended to be insisted upon at

* The above statutes indicate generally the grounds upon which objections to a grant of an annuity will be entertained. The decisions upon the statute first abstracted are numerous, and sometimes conflicting; so much so, as probably to occasion the passing of the statute 53 G. III. c. 141. secondly abstracted; explained and amended by stat. 3 G. IV. c. 92. By these last statutes an annuity transaction is simplified, and what the memorial must contain is defined; it is not very likely therefore, that the later

act will become so prolific in applications to the court upon mere formal points as the first, too frequently, was. Upon mere formal points not at all affecting the moral of the transaction, we know that the courts have been sought to be made the instrument of inflicting great wrong upon meritorious parties; and not seldom, when the court has been called upon so to interfere, it has openly regretted the being bound by a senseless statute to pronounce against an annuity otherwise unimpeachable.

the time of moving to make the rule absolute must be inserted in the rule *nisi*. *R. G. T. 42 G. III. 2 East, 567.*

The application to the court should be made by the grantor of the annuity; though it should seem that any person whose relation to the grantor could be injured, may make the application, for in this case the court vacated the judgment on an annuity bond, and the execution issued thereon at the instance of a third person, judgment creditor. *Saunders v. Hardinge*, clerk, *5 T. R. 9.* but another case seems to limit this interference of the courts to judgment creditors; for where one had assigned a lease as a collateral security for the payment of an annuity, and had afterwards sold his interest in the same lease to a *bonâ fide* purchaser, and although the memorial of the enrolment of the annuity was defective, an application on the behalf of such purchaser for the cancelling the previous assignment to the grantee of the annuity, was refused. *Garrood v. Saunders*, *6 T. R. 403.* but the deed is void, *ib.* and yet in a case *Ex parte Mackreth*, *2 East, 563.* the annuity was set aside by a person not a judgment creditor. On this point, therefore, the practice seems undefined.

By whom application to be made.

The motion must not be "to order an annuity bond to be delivered up to be cancelled." *Symonds and Wife v. Cobourne*, *1 B. & P. 482.* and *Eyre, C. J.* said "the motion should have been to stay proceedings; perhaps that might not have been granted, but the defendant put to plead the circumstances."

Forms of motion.

The Annuity Act does not give a summary jurisdiction over those judgments obtained in the ordinary course of law on any instrument for securing the same. *Buck and Others, executors, v. Tyte*, *7 T. R. 495.* and where there has been acquiescence under a judicial proceeding the court will not interfere. *Withey v. Wooley*, *Id. 540.*

Jurisdiction of the court limited.

Acquiescence.

A fine levied to secure an annuity will not give the court summary jurisdiction over an annuity. *Crawford v. Craines*, *2 H. Bl. 438.*

A fine will not give jurisdiction.

Where a warrant of attorney for securing an annuity was to remain as a security in the hands of a grantee until a sum of money agreed to be accepted in lieu of the annuity should be paid, *C. P.* refused to order such warrant of attorney to be delivered up to be cancelled. *Goring, Bart. v. Welles*, *1 B. & P. 395.* And see *Barber v. Gamson*, *4 B. & A. 281.*

Where motion refused.

The court will direct a warrant of attorney to be set aside though no action be commenced. *Ex parte Chester*, *4 T. R. 694.* See also *1 B. & P. 66. n.* but the memorial needs not state the name of the party in whose favor it is given. *Yems v. Smith*, *3 B. & A. 206.* And see *Ranger v. Chesterfield*, *5 M. & S. 2.*

Where court set warrant of attorney aside.

If a rule for setting aside annuity *nisi* be discharged upon the merits, such a decision is conclusive, though new objection shall be taken to the annuity. *Greathead v. Bromley*, *7 T. R. 455.*

Rule nisi discharged on merits decisive.

And if one court hath decided upon the merits, such a decision is conclusive upon other courts. *Hart v. Lovelace*, *6 T. R. 471.*

Decision of one court conclusive upon others.

Where a representation of facts upon which an application is made to set aside an annuity could only be answered by persons who are dead, the court will not interfere in a summary way.

Where the court, on account of death, will not interfere.

Where it will, even though twenty years be past.

Haynes v. Hare, 1 *H. Bl.* 659. S. P. *Poole v. Cabanes*, 8 *T. R.* 328. *Ex parte Maxwell*, 2 *East*, 85.

But where objections to the memorial arise independently of testimony lost by death or delay, the court will interfere even at the distance of twenty years. In this case the memorial stated that the securities were witnessed by four witnesses, whereas the fact was that three of the securities were witnessed by two. *Ex parte Mackreth*, 2 *East*, 563. S. P. *Van Braam v. Isaac*, 1 *B. & P.* 451.

As to laches.

Laches of the party applying is not of itself an answer to the application. *Grant v. Foley*, *T.* 23 *G. III.* K. B. 1 *Tidd*, 511.

Where an annuity will not be set aside.

An annuity paid without objection for six years, *semble* cannot be set aside for matter arising *dehors* the memorial. *Ex parte Maxwell*, 2 *East*, 85.

Executors of grantee.

In the case of an execution of grantee, an annuity was set aside without costs. *Dickinson, executor, &c. v. Boyne*, 1 *B. & P.* 335.

What discretion-ary in the court.

The interference of the court as to cancelling the securities, where bills were given in part of the consideration, shall have been unpaid is discretionary. *Cheek v. Tower*, 1 *Taunt.* 372.

Mistake will not vitiate annuity.

A mere clerical mistake in the memorial will not vitiate the annuity. *Ince v. Everard*, 6 *T. R.* 545.

Principal and interest may be recovered though annuity set aside.

The act of parliament only vacating the annuity, grantee is not precluded from recovering the principal and interest due on the sum originally advanced: the following are some of the decisions as to this point.

What may be recovered.

If the consideration shall have been partly an old debt due *bonâ fide* for goods sold and the remainder money paid, the grantee may recover the whole; if the annuity be set aside for informality in the registering, 1 *T. R.* 732. but *query* if the former debt had been colourable, or the goods sold but a few days before the transaction? *Ib.*

When surety is discharged.

In case of an annuity being set aside for defective registering, a surety only is not liable to be called upon for payment of principal or interest due on the sum originally advanced. *Stratton v. Rastall*, 2 *T. R.* 366.

What may be set off by grantor.

The grantor of an annuity so vacated may set off the payments made in respect of such annuity. *Hicks v. Hicks*, 3 *East*, 12.

Where assumpsit will lie.

Where the warrant of attorney was directed to be delivered up to be cancelled, and the judgment thereon was set aside, it was determined that assumpsit would lie, and that the grantor was not to be put to his action on the other securities. *Scurfield v. Gowland*, 6 *East*, 241.

See tit. WARRANT OF ATTORNEY, sec. II. *post*.

PRACTICAL DIRECTIONS.

If the annuity be supposed void or voidable upon merits, a full affidavit of all the circumstances intended to be relied upon on the application to vacate the same, should be made; and if proceedings have been commenced in either of the courts, the affidavit should be entitled in the cause.—Give this affidavit and a brief of instructions to serjeant or counsel to move for a rule to shew cause why the proceedings should not be stayed, the judgment vacated, and the warrant of attorney delivered up to be cancelled. If upon defective memorial, &c., the at-

tion of the court should be drawn thereto by office copy properly verified.

The grounds of objection to the annuity are to be stated in the rule nisi as above mentioned.

Since the passing of the late act 53 G. III. c. 141. objections to a grant of an annuity on the ground of defective memorials, are less likely to be very frequent; but if objection be intended to be taken, get an office copy of the memorial as above, and annex it to the affidavit of the facts necessarily to be stated, to shew a variation of the memorial from the securities by which the annuity hath been granted.

On the part of the grantee of the annuity, an office copy of the affidavit upon which the rule nisi was granted must be obtained of the clerk of the rules K. B. or secondary C. P. An affidavit may be made in cancer, or it may be otherwise shewn that the acts have been observed.

For further general instructions, see tit. MOTION, post.

APPEAL. An attorney loses his privilege where appeal is brought. What. 1 Tidd, 77.

APPEARANCE, Common. Entering appearance to a special capias, unailable K. B. or to a capias in C. P. with the filacer proper to each count. See tit. BAIL; COMMON BAIL, post.

An act or proceeding of the same import as that of filing common bail, or the first act of a defendant in defending a suit or action notailable commenced against him by original writ K. B.

Where the defendant is served with a copy, he must cause a common appearance to be entered on the return day of the process, or within eight days after. When stat. 5G.II. c. 27.

In 1 Sellon, 96. a query is made as to whether the defendant be not liable under 9 & 10 W. III. c. 25. s. 33. to a penalty of 5l. for not appearing. Qy. as to penalty for not appearing.

The eight days are to be computed from the return of the capias, and not from the quarto die post; e. g. if the process be returnable in eight days of St. Hilary, the 20th January, the appearance for the defendant may be entered at any time before or on the 28th. How time computed.

A common appearance being entered by the defendant cures all defects in the mesne process. Wade v. Wadman, Bar. 167. Lloyd v. Williams, 3 Wils. 141. Hole v. Finch, 2 Wils. 393. Doe v. Butcher, 3 T. R. 611. 1 Chit. R. 129. n. So also, even an attorney's undertaking to appear. Id. ib. tamen quare? Appearance cures defects in mesne process.

If husband and wife be sued, the husband must appear for both. Collins v. Shapland and Wife, Bar. 412. and if the husband appear for himself only, plaintiff cannot sign judgment as if no proper appearance had been entered. Clarke v. Norris and Wife, 1 H. Bl. 235. In case of husband and wife.

If defendant act as if an appearance had been entered he shall not be allowed to insist upon the want of it. Williams v. Strahan, 1 New Rep. 309. When defendant acts as if appearance had been entered.

An attorney is bound by his undertaking to enter a common appearance. R. M. 1654. Lorymer v. Hollister, 1 Str. 693. 1 Chit. R. 129. n. Attorney undertaking to appear, bound.

Query. Whether the undertaking need be in writing. 1 Sel. Qy. 493.

Accepting the declaration, an undertaking to appear. 1 Sel. Qy. 493. What shall amount to an undertaking.

PRACTICAL DIRECTIONS.

Formerly, viz. before stat. 13 E. I. defendants usually appeared in person, but now they may appoint attorneys.

The common appearance must be entered of the term the writ is returnable, with the filazer K. B., or with the filazer of the county to which the writ issues, in a book kept for that purpose; pay 2s. 6d. and 4d. additional for every defendant exceeding one.

At the time of entering the common appearance a memorandum or warrant to defend must be filed, pursuant to stat. 25 G. III. c. 80. See tit. MEMORANDUM or WARRANT, post.

If the proceedings be by attachment of privilege or by bill, the appearance must be entered with the prothonotary instead of the filazer.

And although a corporation may, in ordinary cases, act only under their common seal, yet the City of London, for example, makes an attorney every year by warrant of attorney in K. B. without sealing or signing; and being by record, the corporation is estopped from saying it is not its act. See 1 Tidd, 106.

See titles INFANT. PRISONER, post.

Other points relating to APPEARANCE will be found under appropriate titles.

FORM.

[County.] *To wit.*

Appearance for Richard Roe, ats. John Doe to a capias returnable in eight days of St. Hilary.

T. S. defendant's attorney.

_____ day of _____, 18

To be written on a slip of paper.

APPEARANCE, Of entering the same by the plaintiff, according to the statute.

Stat. 12 G. I.
c. 29.

By stat. 12 G. I. c. 29., altered by stat. 5 G. II. c. 27. "If the defendant having been served with process shall not appear at the return thereof, or within eight days after such return, the plaintiff, upon affidavit of the service of such process made before a judge or commissioner of the court for taking affidavits, or before the proper officer for entering common appearances, or his deputy, affidavit to be filed gratis, may enter a common appearance, or file common bail for the defendant, and proceed thereon as if such defendant had entered his appearance, or filed common bail;" by which statute a defendant may deposit a certain amount instead of giving bail.

See tit. ARREST FOR DEBT, post, where this statute is more fully abstracted.

When it may be entered according to the statute.

If the writ be returnable the 20th January, the defendant has the whole of the 28th to enter an appearance; if he do not, plaintiff may, pursuant to the statute, enter the same for him on or after the 29th, but not after the second term after the return of the process. Smith v. Painter, 2 T. R. 719. Davis v. Hughes, 7 Id. 206.

No memorandum necessary.

No memorandum or warrant to defend is necessary to be filed by the plaintiff in this case.

Stat. 43 Geo. III. c. 46. s. 2, by which statute a defendant may deposit a certain amount instead of giving bail; see tit. ARREST FOR DEBT, *post*, where this statute is more fully abstracted, provides, that "in case the defendant shall not put in and perfect bail in the action, the sum of money so deposited and paid into court shall, by order of the court upon motion, be paid out to the plaintiff, who shall be thereupon authorized to enter a common appearance, or file common bail for such defendant, if the plaintiff thinks fit." See titles DISTRINGAS, MEMBER OF PARLIAMENT, PEER, *post*.

Where entered on stat. 43 G. III. c. 46.

If the defendant be sued by a wrong name plaintiff cannot enter appearance according, &c. in his right name. *Westall v. Finch, Bar. 406. Doe v. Butcher, 3 T. R. 611.*

Where entered by plaintiff after *distringas*. When sued by a wrong name.

Where the plaintiff enters an appearance according to the statute he is not obliged to notice any attorney employed by the defendant, unless such attorney also deliver or file a plea. *Cooke's Rep. 116.*

Where no attorney to be noticed by the plaintiff.

An appearance was entered according to the statute by a wrong name, yet as the writ, declaration, and affidavit named him rightly, the court ordered the filazer to alter the entry of the appearance. *Wheston v. Packman, 3 Wils. 49.*

Where court ordered the filazer to alter the entry of appearance.

The plaintiff must appear according to the statute before the declaration if filed, be filed in chief. *Matthews and Wife v. Stone, Bar. 242.*

When to appear according, &c.

But where an appearance was entered by the plaintiff, according to the statute, before the regular time for defendant's appearance, and notice of declaration had been served, an application after judgment signed to set the same aside for irregularity was held too late. *Morse, an attorney, v. Farnham, Bar. 242.*

Where appearance entered according, &c. irregularly, when to apply.

Where a plaintiff having issued one writ against three defendants for separate causes of action, and after delivering three separate declarations *de bene esse*, had entered one common appearance according to the statute for all the defendants, and had signed three interlocutory judgments as for want of plea: Held irregular. *Cox v. Bucknell, 5 B. & A. 892.*

Where separate appearance according, &c. necessary.

No demand of plea is necessary to be made where appearance is entered according, &c. *North v. Lambert, 2 B. & P. 218.*

PRACTICAL DIRECTIONS.

The same as those last above stated; but the following affidavit of service of copy process must previously be made. Add on the slip or memorandum delivered to the filazer these words "filed according to the statute."

FORM.

[Court.]

Between { _____, plaintiff.
and _____, defendant.

Affidavit of the service of the copy of the process.

_____ of _____, clerk to _____, attorney for the plaintiff in this cause, maketh oath and saith, that he did, on the _____ day of _____ instant, personally serve the above named defendant with a true copy, [omitting the word "copy" after "true," bad. *Anon. 1 Chit. R. 562. n.*] of a writ of *capias ad respondendum*, which appeared

APPEARANCE; CASES; APPEARANCE DAY.

to this deponent to be regularly issued out of this honorable court, and returnable before his majesty's justices at Westminster, [or "before the king himself, or at Westminster" as the case may be,] on ——— under which said copy was written an English notice to the said defendant of the intent of such service, pursuant to the statute in that case made and provided.

T. S.

Sworn, &c.

Stamp, 2s. 6d., oath, 1s.

N. B. This affidavit may be sworn before the plaintiff's attorney, although a commissioner in C. P., but in K. B. it cannot be sworn before the plaintiff's attorney.

APPEARANCE, C. P. *Discharge on Common.* See tit. AFFIDAVIT, *ante*; titles ARREST, and the list of persons exempted therefrom subjoined thereto; and COMMON BAIL, *post*.

Observation.

Where circumstances under which judge's order is obtained to hold to bail are concealed, defendant discharged.

Where not discharged.

Some cases, not distinctly falling under either of the above or other titles, will be collected under this more obvious one.

If a defendant be holden to bail under a judge's order, a material fact being concealed from the judge, which would probably have induced him to refuse the order, the court will discharge the defendant on a *common appearance*, even though there were otherwise a sufficient affidavit of debt. *Davis v. Chippendale*, 2 B. & P. 282.

The court will not discharge a defendant on a *common appearance* under statute 34 G. III. c. 9. s. 7. on the ground of the plaintiff's residence in Holland. *Pieters and another v. Luytjes*, 1 B. & P. 1.

A woman trader contracting a debt here in her husband's absence abroad, and arrested for the same, will not be discharged on a *common appearance*, on the ground of coverture, though that fact were known to the plaintiff. *De Gaillon v. V. H. L'Aigle*, 1 B. & P. 8.

Infancy is no ground for a discharge on a *common appearance*. *Maddox v. Eden*, 1 B. & P. 480. It must be pleaded.

Nor is the certificate under bankruptcy, provided its validity be intended to be disputed. *Stacey v. Federici*, 2 B. & P. 390.

The court will not order a common appearance to be entered, on the ground that the plaintiff having proved his debt had been chosen assignee under a commission of bankrupt issued against the defendant. *Hill v. Reeves*, 1 B. & P. 424.

Nor if the defendant be in custody at the suit of the petitioning creditor on the same debt on which the commission of bankruptcy founded. 3 B. & P. 6.

APPEARANCE DAY. The first day in full term, and the last day of every term, are days of appearance. Where continuances, having reference to days of appearance, are to be entered of record, the first and last day of the term are those specified.

In an action on a bail bond, if the issue depend on the date of the appearance, the court will order the *day of the appearance* to be entered in the filazer's book, although before the application to the court issue has been already joined on the plea of *comperuit ad diem*. See titles RETURN OF WRIT, TERM, *post*.

APPOINTMENT; PR. DI.; ARBITRATION.

67

APPOINTMENT *by the master or prothonotary.* R. G. H. 32 Geo. III. On every appointment to be made by the master the party on whom the same shall be served and required to attend, shall attend such appointment without waiting for a second; or in default thereof, the master shall proceed *ex parte* on the first appointment; but it is of course understood agreeably to former general rules, that no summons, appointment, &c. shall be made for any time during which the courts at Westminster shall be sitting. See titles ATTORNEY, BILL OF EXCHANGE, JURY, SPECIAL JURY, TAXING COSTS, *post*.

PRACTICAL DIRECTIONS.

On matters referred to the master or prothonotary for decision or report, an appointment is procured by application at their respective offices. The appointment being usually written upon the rule or order whereby the reference is made, serve the copy of such rule or order with the appointment thereon; but the appointment may be obtained after the service of the copy of the rule or order; if so, serve copy of the appointment itself, as made by the master or prothonotary.

ARBITRAMENT. May be pleaded in bar, or by way of discharge.

ARBITRATION. The agitation of a controversy before an arbitrator mutually agreed on by the parties. What.

1. The arbitration under the statute hereafter mentioned, 2. By order of *nisi prius*, 3. By judge's order, 4. By bond or agreement, and by rule of court; being in their end the same, the whole subject will be treated under the above general title; and the less objectionably so, as much of the law applicable to either course of proceeding is applicable to the four divisions. Observations.

As this subject frequently engages the attorney's attention, the late and most important decisions relating to the *practice* on arbitration will be here collected; some notes of those also, as to the general law affecting the same, will incidentally be mentioned: but a work of this description will necessarily, and perhaps most usefully, be confined to the law, as it concerns *practical* points only.

By statute 9 & 10 W. III. c. 15. all merchants, traders, and others desiring to end any controversy, suit or quarrel, *for which there is no other remedy but by personal action or suit in equity*, by arbitration, may agree that their submission of their suit to the award or umpirage of any person or persons, shall be made a rule of any of his Majesty's courts of record, which the parties shall choose, and to insert such their agreement or promise in their submission or the condition of the bond, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof, made by witnesses thereunto, or any one of them, in the court in which the same is agreed to be made a rule, and reading and filing the same affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court that the parties

Stat. 9 & 10
W. III. c. 15.

shall submit to and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire pursuant to such submission; the parties neglecting to perform the arbitration or umpirage, or any part thereof, to be subject to the penalties of contemning a rule of court when he is a suitor or defendant in such court, and process for contempt may issue, and which shall not be stayed by the interference of any other court of law or equity, unless it shall appear on oath that such arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage, was procured by corruption or other undue means. And

Sect. 2.

By sect. 2. such arbitration or umpirage so procured shall be deemed void and be set aside, provided complaint thereof be made in the court where the same shall be made a rule for submission *before the last day of the next term after such arbitration or umpirage shall have been made and published to the parties.*

To what cases the statute extends.

The statute seems to be confined to submissions by obligation. *Anderson v. Coxeter*, 1 Str. 301. And does not extend to make a parol agreement for submission a rule of court. *Ansell v. Evans*, 7 T. R. 1. *Lucas ex dimiss.* *Dr. Markham v. Dr. Wilson.* And only civil suits or controversies are comprehended under it. *Watson v. Cullum*, 8 T. R. 520. But see *Baker v. Townsend*, 1 J. B. Moore, 120. S. C. 7 Taunt. 422.

When submission may be revoked or not.

But it is competent to either party formally to revoke his submission previously to the authority being executed, but not afterwards; and therefore, an award made after such formal revocation cannot be enforced. *Milne and others, assignees, &c. v. Gratrix*, 7 East, 608. Yet the arbitrators are right in afterwards proceeding to award, because the party continuing in submission is entitled to his action for damages on non-performance of the covenant to abide the award; and if bound in a penalty, the same is not avoided by the revocation. *King v. Joseph*, 5 Taunt. 452.

After a reference under an order of *Nisi Prius*, submission is not revocable. 1 Chit. R. 200. And it would be contempt to revoke submission after it has been made a rule of court. See *Milne v. Gratrix*, 7 East, 608. *King v. Joseph*, 5 Taunt. 452.

By death.

So the death of one of the parties at any time before the award made, is a revocation of the arbitrator's authority; and the court will set aside an award made subsequently to such death. *Potts v. Ward*, 1 Marsh. 366. *Cooper v. Johnson*, 1 Chit. R. 187. And it should seem that *Bower v. Taylor*, E. 56 G. III, K. B. cited *Caldwell on Arbitration*, page 30; and 7 Taunt. 574, 5. is now over-ruled. Also, where a verdict taken by consent, subject to an award, and defendant dies before award, *ubi sup.* 1 Marsh. 366. *Toussaint v. Hartop*, 7 Taunt. 571. 1 J. B. Moore, 287, S. C. But see *Turner v. Cowper*, Bar. 210. cited 1 Marsh. 366, above.

And as to what count shall be good in an action for breach of covenant to obey, abide by, and perform an award, see *Marsh, executor, &c. v. Bulteel*, 5 B. & A. 507.

Arbitration limited to the terms of the submission.

All matters in difference between the parties should be stated to be referred if it be so intended; if not, "all matters in difference in the cause." *Smith v. Muller*, 3 T. R. 624. as the arbitration will be extended or limited agreeably to the terms of the

submission. See *Malcolm v. Fullarton*, 2 *T. R.* 645. Upon a cause of action not submitted to an arbitrator, nor included in the reference, a suit will lie, though it shall appear that the terms of the reference were "all matters in difference." *Ravee v. Farmer*, 4 *T. R.* 146.

Where all actions, controversies, and also two distinct matters of difference are submitted by the terms of the agreement, and the award omit to decide one of such matters, the whole award is bad, and cannot be enforced by attachment. *Randall v. Randall*, 7 *East*, 81. *George v. Lousley*, 8 *East*, 13. but if it be not a condition of the submission that the award shall be made on all the points submitted, an award, determining some of the points only, is good, provided that the omission of the other do not destroy the equipoise of consideration. *Sinimonds v. Swaine*, 1 *Taunt.* 549.

Where an action for breach of covenant was pending, and, with all matters in difference, was referred to arbitration, the costs of the suit to abide the event: Held, that an award that the plaintiff had no demand on the defendant, on account of any alleged breaches of covenant, or on any other account whatsoever, was final, although the suit was not in terms put an end to. *Jackson v. Yabsley*, 5 *B. & A.* 848.

Where award held final.

So, where upon the trial of an action of tort, a verdict was found for the plaintiff, subject to a reference of all matters in difference. The defendant claimed before the arbitrator a sum of money due to him upon a balance of an account, which was admitted by the plaintiff to be due, the award, without stating that it was made, of and concerning the premises, directed a verdict to be entered for the plaintiff, with damages: Held, that this award was sufficient. *Gray v. Gwennap*, 1 *B. & A.* 106.

If an award order two things in favour of one party, one of which is uncertain, or the order respecting it cannot be enforced, he may waive this, and sue upon the breach of the order as to the other. 5 *Id.* 358.

And an award that two persons shall pay a debt in proportion to the shares which they held in a certain ship, the ratio of their shares not being a subject of dispute is sufficiently certain. *Wohlenberg v. Lageman*, 6 *Taunt.* 254.

It should seem that where it was left uncertain what court the submission should be made a rule of, it may be made of any superior court. *Soilleux v. Herbst*, 2 *B. & P.* 444.

As to making the submission a rule of court.

Though the terms of the bond were to make the award instead of the submission a rule of court, the court was held to have jurisdiction under the statute. *Pedley v. Westmacot*, 3 *East*, 603, *contra Harrison v. Grundy*, *Str.* 1178; and *Powell v. Phillips*, there cited by the master. *E.* 30 *G.* 111.

And such submission may be made a rule of court in vacation. In *re Taylor and others*, 5 *B. & A.* 217. Although, agreeably to the point ruled in this case, also above cited, the arbitrator may, notwithstanding revocation, make his award, yet after revocation, the submission ought not to be made a rule of court. *King v. Joseph*, 5 *Taunt.* 452. But see *Aston v. George*, 1 *Chit. R.* 200, where it was held, that after notice of revocation, an order

Where submission a stay of proceedings.

Where arbitrator may award costs.

of *Nisi Prius* referring a cause to arbitration, might be made a rule of court, and such order cannot be revoked. 1 *Chit. R.* 202, 3.

A submission is no stay of proceedings, unless it be so mentioned. *Ld. Raym.* 789.

An arbitrator may award costs without any express authority for that purpose. *Roe d. Wood v. Doe*, 2 *T. R.* 644. But he cannot without authority charge a certain sum for his own expences. *George v. Lousley*, 8 *East*, 13. See also *Fitzgerald v. Graves*, 5 *Taunt.* 658. But it had previously been made a question, whether an award upon the reference of an action directing the payment of the costs of an award, without fixing the amount thereof, was bad in that point for uncertainty, or whether the amount may not be taxed by the officer of the court. *Barrett v. Parry*, 4 *Taunt.* 658.

But C. P. held that the general term "costs" in a rule of reference, did not include the costs in that reference. *Bradley v. Tunstow*, 1 *B. & P.* 34, and that an award of "costs sustained in the action," does not include the costs of the reference. *Browne v. Marsden*, 1 *H. Bl.* 223. And see *Strutt v. Rogers*, 7 *Taunt.* 213, and if they are demanded, an attachment will not lie. *Id. ib.*

Where, however, by the rule of reference "the costs were to abide the event of an award," that includes the costs of the reference as well as the costs of the cause. *Wood v. O'Kelly*, 9 *East*, 436.

So where a special jury having been obtained on the motion of the defendant the cause was referred, and by the order of reference the costs of the cause were to abide the event, and the costs of the reference, and the special jury, were left in the discretion of the arbitrator: Held, that the arbitrator cannot, after directing a verdict for the plaintiff, award that the latter should pay the costs of the special jury. *Finlayson v. McLeod*, 1 *B. & A.* 663.

Under a submission to arbitration of two assaults (for one of which the defendant had been convicted at the quarter sessions), and of all costs incident to the indictment, and subsequent proceedings thereon: Held, 1st, That the indictment and assaults might legally be referred. 2d, That the arbitrator did not thereby exceed his authority. *Baker v. Townsend*, 7 *Taunt.* 422. S. C. 1 *J. B. Moore*, 120.

A judge's order directed that a cause should be referred, and that either party wilfully preventing the arbitrator from making an award, by affecting delay or otherwise, should pay such costs as the court thought reasonable and just: Held, that such order might be made a rule of court, after one of the parties had revoked the authority of the arbitrator. *Aston v. George*, 2 *B. & A.* 395. 1 *Chit. R.* 200.

But as one of the parties revoked the arbitrator's power because such party was not able to procure his witnesses, he was held not liable to costs. *Aston v. George*, *Id.*

Where an arbitrator awards damages without any mention of costs, and directs that execution shall not be taken out for the damages, but that they shall be set off against countermands of defendant, the plaintiff's attorney may take out execution for the costs, which, by the rule of reference, were to abide the award.

The Highgate Archway Company v. Nash, 2 B. & A. 597.
1 Chit. R. 325. S. C.

An arbitrator under a rule of reference which directs that the costs of the cause shall abide the event, has no power to direct those costs to be set off against the costs in a prior cause, although all matters in difference are referred, but the award is not to be set aside only for that part which is incorrect. *Hursted v. Kidd*, *Id.* 526.

And where the terms of the reference stated, that if arbitrator should award that the plaintiff had any cause of action, he should have costs as in a court of law, and the arbitrator, without finding in terms, that the plaintiff had any cause of action, awarded the defendant to pay him money, and pay costs: Held, that this omission did not vitiate the award, and in the same case, it was also held, that if the award were bad as to the direction of mutual releases, that would not vitiate the whole award. *Doe, d. Williamson v. Richardson*, 8 Taunt. 697.

Where the award does not mention the costs of the reference at all, they are to be paid by both parties equally. *Grove v. Cox*, 1 Taunt. 165.

But where the defendants were held to bail for 130*l.* and the cause being referred, the arbitrator found only 20*l.* due, the court would not allow them, under the stat. 43 G. III. c. 46. s. 3. their costs. *Payne v. Acton* and another, 1 Brod. & Bing. 278.

And where nominal verdict and reference to adjust the amount were set aside, and new trial had, and the plaintiff recovered, he was held entitled to the costs of both trials. *Payne v. Bayley*, 3 *Id.* 304. And see tit. COSTS generally, post.

An arbitrator having power to choose an umpire, may elect one immediately previous to entering upon the examination of the matters referred to them. *Roe, d. Wood v. Doe*, 2 T. R. 644. When umpire may be chosen.

And the nomination, though in writing, requires no stamp. *Routledge v. Thornton*, 4 Taunt. 704.

By the terms of a reference to arbitration, the two arbitrators were to appoint an umpire before entering into consideration of the matters in difference, and to make their award before a certain day, or such time as they or any two of them should appoint. The arbitrators, before appointing an umpire, enlarged the time, and afterwards held a meeting at which the parties attended: Held, that the parties being aware of these facts, and having afterwards attended, could not now make any objection, on the ground of the enlargement time having been made before the appointment of the umpire. *In re Hick and others*, 8 Taunt. 694.

Where the parties named two arbitrators, who were to choose an umpire, and each arbitrator named a person, to whom the other objected; and they afterwards agree to decide by lot which should name the umpire, and thereupon the party who won, named the person to whom the other had previously objected: Held, that the award made by such umpire was bad. *Wells v. Cooke*, 2 B. & A. 218.

Submission to the arbitration of two, and in case they disagree, to the umpirage of a third, so that the arbitrators made their award

Where the award of an umpire is good;

Though witnesses not sworn.

Where arbitrator may himself examine a witness.

Where administratrix of a partner not allowed choice of arbitrator.

Award of money in an illegal transaction, bad.

So where the matter referred is already subject of indictment.

If mistake in the law, the award bad.

on or before a day certain, and the umpire, if they should differ before a subsequent day; and the umpire made his award before the time given to arbitrators expired: Held, that the umpirage need not state that the arbitrators had disagreed. *Sprigens v. Nash* and another, 5 *M. & S.* 193.

An award by an umpire is good, although he receive the evidence from the arbitrators and not from the witnesses, unless he were requested to examine them before making the award. *Hall v. Lawrence*, 4 *T. R.* 589.

No objection being made at the time, an arbitrator needs not examine the witnesses on oath, and the award is not bad on that account. *Ridoat v. Pye*, 1 *B. & P.* 91.

So an arbitrator may himself examine a witness, who may alter his testimony after the evidence on both sides shall have been closed; but such re-examination must not appear to have been effected by management. *Atkinson v. Abraham*, 1 *B. & P.* 175. But see *Campbell v. Twemlow*, 4 *Price*, 232.

For where notice was given to one of the parties to attend a meeting, for the purpose of taking instructions for the award, and at that meeting that party did not attend, but the other party attended, and was examined privately on the evidence which he then gave, the amount he was to pay was decreased by the arbitrators: Held, that this private examination of the party in his own favour, vitiated the award. *In re Hick and others*, 8 *Taunt.* 694.

So where an arbitrator having by mutual agreement of the parties closed his examination, refuses the application of the defendant's attorney for another hearing, and makes his award; the court will not set aside the award on the affidavit of the defendant's attorney, that he is in possession of evidence which could repel that on which the award was founded. *Ringer v. Joyce*, 1 *Marsh.* 404.

Where the submission is by covenant by partners to abide the award of arbitrators, one to be chosen by each partner, the administratrix of one shall not be at liberty to name an arbitrator. *Tattersell v. Groote*, 2 *B. & P.* 131.

If an arbitrator *inter alia* award money to be paid on account of an illegal transaction, the court will set aside the award as to this part. *Aubert v. Maze*, 2 *B. & P.* 371.

Nor where the matter in reference is already the subject of an indictment will the court make the submission to an award a rule of court. *Watson v. M'Cullum*, 8 *T. R.* 520.

Yet though an arbitrator, on a question of mixed law and fact, have allowed transactions apparently illegal, as premiums of insurance on a voyage to a hostile port, the court will not set aside the award. *Wohlenburg v. Lageman*, 6 *Taunt.* 254.

If an arbitrator mistaking the law make an award, and such his mistake appear in any authentic manner, whether upon the fact of the award or otherwise, the award will be set aside. *Kent v. Elstob*, 3 *East*, 13, but such mistake must not appear as mentioned in the last case, it cannot be *inferred* from any statement that the law was mistaken by the arbitrator. *Delver, assignee, &c. v. Barnes*, 1 *Taunt.* 48. *Anon.* 1 *Chit. R.* 674. See also *Id. ib. n.*

It seems to be very much doubted whether an award contrary to law may be made. A distinction was taken as to whether a demand may be *conscientiously* due, and yet be *legally* withheld, and *quare* the power of an arbitrator in this case. Mr. Taunton has very industriously subjoined, *ubi supra*, a note containing several conflicting observations of different judges. Perhaps the useful self confidence of arbitrators would be lessened if it were expected of them that their awards should be *strictly* legal; on the other hand, if it were not, the decisions of arbitrators would arrogate more stability than the most solemn adjudications of the courts at Westminster. Still an arbitrator cannot make an award contrary to a statute, or where the matter to be performed is *malum in se*. See the above case, and Mr. Taunton's note subjoined thereto. Award contrary to law.

Since making the above observation, a case has been reported, wherein it was determined, that where a cause involving a question of law, was referred to a barrister under a rule of court, to settle all matters in difference between the parties, and he made his award thereupon, but the question of law did not appear upon the face of the award, the court, considering that it was the intention of the parties to refer the decision of the merits as well upon the matter of law as the fact to the arbitrator, refused to open the award again, upon a suggestion of the arbitrator's mistake in point of law, upon the construction of a contract between the parties. *Chace v. Westmore*; *Westmore v. Forbes*, 13 *East*, 357. See also as to where the award of a professional man was considered final, although he doubted whether a statute were correctly printed, and advised a recurrence to the roll. *Price v. Hollis*, 1 *M. & S.* 105.

And where an arbitrator, a barrister, rejected a witness as inadmissible in point of law, the court of Exchequer refused to set aside the award on that ground. *Campbell v. Twemlow*, 1 *Price*, 81.

But the court will not review an award, on the suggestion that the arbitrator, to whom all matters of indifference were referred, considered only the legal, and rejected the equitable questions, when the party applying does not state to the court any equitable cases or question, which he supposes the arbitrator to have rejected. *Craven v. Craven*, 7 *Taunt.* 644. S. C. 1 *J. B. Moore*, 403.

An arbitrator is not bound by a rule of practice, adopted by the courts of law for general convenience, and therefore, where on a reference of a chancery suit, and all matters in difference between the parties, the arbitrator had allowed interest (when it would not be allowed by a court of law or equity,) the court refused to set aside the award on that ground. *In re Badger*, 2 *B. & A.* 691.

Where it was stipulated, that in case of the breach of an agreement, the sum of 100*l.* should be received as a stipulated debt, binding on each party as to the amount; and an action for damages generally, for the breach of this agreement, was referred to an arbitrator, who awarded only 10*l.* damages: Held, that in order to entitle the party to come to set aside this award, it was necessary expressly to state in the affidavit, that this clause was

pointed out to the arbitrator at the time, and that he was required to act upon it. *Pinkerton v. Caslon*, 2 B. & A. 704.

Agreement for a lease for sixty-three years, from the 1st of May, 1811, the lessee to be allowed three years from that time for winning the colliery, without payment of any rent. An arbitrator being authorized to give such direction for a lease according to the agreement as he should think fit, directed a lease for sixty-three years, from the 1st of May, 1804: Held, that he had exceeded his authority, and that the award was bad. *Bonner v. Leddill*, 1 Brod. & Bing. 80.

If a plaintiff recover a verdict for 5*l.*, subject to an order of reference at *nisi prius*, whether such verdict should stand, or be reduced to 20*s.*; and the arbitrator refused to make an award, the court will not allow a verdict to be entered for the lesser sum, until such order be made a rule of court. *Kirkus v. Hodgson*, 3 J. B. Moore, 64.

If the terms of an award be clear upon the face of it, the court will not admit an affidavit of one of the arbitrators, to explain their intention. *Gordon v. Mitchell* 3 J. B. Moore, 241.

The court cannot interfere to enter a nonsuit against the arbitrator's direction, but the party objecting to the award must move to set it aside. *Peters v. Anderson*, 1 Marsh. 238.

Before motion for an attachment for not paying money upon an award, a personal demand thereof must be made. *Brandon v. Brandon*, 1 B. & P. 394. 2 Saund. 186. (1). *Per Lord Kenyon*, 35 G. III. K. B. 2 Tidd, 868.

And if more be demanded than the arbitrators had power to award, attachment will not be granted. *Strutt v. Rogers*, 7 Taunt. 213.

The court will not, upon circumstances short of actual acknowledgment that the copy of the award come to the party's hand, infer personal service of an award to bring a party into contempt. *Brander v. Penleaze*, 5 Taunt. 813. So where money is awarded on an agreement, to be paid for the purchase of land, the party must swear to a conveyance being tendered. *Standley, esq. v. Hemington*, 2 Marsh. 276. 6 Taunt. 561. S. C.

And where an award is made after the time has been enlarged, there must be an affidavit of that fact, and that the award was made within the enlarged time, as well as that the party had been personally served with a notice of these facts. *Wohlenberg v. Lageman*, 6 Taunt. 251.

Semble. That upon motion for an attachment for non-performance, the affidavit must state the time of the execution of the award. *Ib. id.*

And the court will not grant a rule that service of attachment on defendant's attorney shall be sufficient, though it be sworn that repeated attempts have been made to serve him personally with a copy of the award, but he was not to be found, and although it is suggested that defendant keeps out of the way to avoid being served. *Read v. Hore*, 1 Chit. R. 170.

The affidavits made in answer to a rule *nisi* for an attachment, must be entitled on the civil side of the court in the cause of which the motion arises, but after the rule for the attachment is

Demand necessary before attachment.

As to entitling affidavits for attachment.

granted the affidavits concerning such attachment are entitled on the crown side. *Whitehead v. Frith*, 12 *East*, 165.

Upon an application for an attachment for non-performance of an award, it is competent to the parties to object to the award for any illegality apparent upon the face of it, though the time for setting it aside be expired. *Pedley v. Goddard*, 7 *T. R.* 73. but in case the time be expired the court will not listen to any application to set aside the award on account of any objection appearing on the face of it, *Ib.* *Lowndes v. Lowndes*, 1 *East*, 276; and in shewing cause against an attachment so to be issued, the award cannot be impeached after the time limited by the statute for defects not appearing on it. *Holland v. Brooks*, 6 *T. R.* 161.

When objection to be made to award.

And if the day for making the award have elapsed without any award made, the court will not grant an attachment for disobedience to the order, unless notice of the enlargement of the time have been served upon him. *Hilton v. Hopwood*, 1 *Marsh.* 66. See tit. ATTACHMENT FOR CONTEMPT, *post*.

As to attachment where time enlarged.

And when the time for making his award is enlarged, and the award is made within that time, a party must have regular notice of the enlargement, proved by affidavit, or by indorsement on the copy of the submission or of the rule of court, before he can be brought into court for disobedience to it, and is it not sufficient that the arbitrator state in his award that he has enlarged the time. *Id.* 579.

If an arbitrator have power to enlarge the time for making his award to any other day, such power extends to enable him to enlarge the time to some other days. *Barrett v. Parry*, 4 *Taunt.* 658.

No attachment can be issued upon an award made in a cause different from that in which the original rule of court was made; the reference should have been made by the parties on the record. *Owen v. Hurd*, 2 *T. R.* 643.

Attachment upon an award different from that of the rule of court.

An agreement for enlarging the time for making the award in general terms indorsed on the bonds, shall comprehend all the original and particular terms of the submission to the reference, and a former case, *contra.* *Jenkins v. Law*, 8 *T. R.* 87. was over-ruled. *Evans v. Thompson*, 5 *East*, 189.

Original terms of submission is comprehended in an agreement to enlarge the time for making the award.

A motion to refer an award to the same arbitrator must be made before the last day of the term next after such award shall have been made pursuant to the statute. *Zachary v. Shepherd*, 2 *T. R.* 781.

When motion to refer an award to the same arbitrator must be made

If the award be made in time, and be ready to be delivered, though not delivered, it is valid. *Brown v. Vawser*, 4 *East*, 584.

As to time for making and for delivery of award.

If it appear doubtful whether arbitrators had made the award either previous or subsequent to their receiving notice of a deed of revocation, the court will not stay the proceedings but leave the party to plead such award *puis darrein* continuance. *Lowes v. Kermore*, 2 *J. B. Moore*, 30.

If the time for making the award be duly enlarged, the award made within the enlarged time is good, though it do not recite that fact; but an attachment will not be issued unless the fact of due enlargement be verified. *George v. Lousley*, 5 *East*, 13; and that fact must be verified by affidavit, and that the defendant

had notice of such enlargement of the time within which the award was made when served with the rule for the attachment. *Davis v. Vass*, 15 *East*, 97; and see also *Moule v. Stowell*, *id.* 99.

And it has been determined that the time for making the award was duly enlarged by the arbitrator, who, under the judge's order upon which the reference had been made, was enabled to enlarge it to such time as he should require, and such judge might think reasonable, on the day preceding the expiration of the original time indorsed thereon; that he required further time, although the judge's order granting such further time, was not made till a day subsequent. *Reid v. Fryatt*, 1 *M. & S.* 1.

And submission to two, so as they made their award on or before a day certain, but if they do not by the time appointed make their award, then to an umpire, provided he make his award on or before a subsequent day, the arbitrators finally disagree before their time expires, and declare they will not make any award, and do not make any: Held, that the umpirage might be made after the final disagreement of the arbitrators before the time allowed them had expired. *Smailes v. Wright*, 3 *M. & S.* 559.

But after the delivery of an award, the arbitrator's authority having been once completely exercised, is at an end, and cannot be again revived, even for the correction of a mistake. *Irvin v. Elton*, 8 *East*, 54; and that the authority of arbitrators once executed cannot be executed again, was also recognized, and reference to the last-mentioned case made by Lord Ellenborough, C. J. in *Oliver v. Collings*, 11 *East*, 567. *Henfree v. Bromley*, 6 *East*, 309.

If an arbitrator has power to enlarge the time for making his award to any other day, he may enlarge it more than once. *Payne v. Deacle*, 1 *Taunt.* 509.

To debt on an award made by arbitrators, upon a submission to them generally without any time, is a plea that they did not make any award within a reasonable time, adjudged ill. *Curtis v. Potts*, 3 *M. & S.* 145.

Where party dies
before award.

Where a verdict is found for the plaintiff, subject to an award, and before award made the defendant dies, a subsequent award that the verdict should be entered for the defendant, and also judgment thereon, cannot be supported. *Toussaint v. Hartop*, 7 *Taunt.* 571. S. C. 1 *J. B. Moore*, 287.

So if a juror be withdrawn, and the cause referred, an award made after the defendant's death is clearly bad. *Per Gibbs*, C. J. *Toussaint v. Hartop*, 7 *Taunt.* 571.

And therefore, taking a verdict for the plaintiff, subject to a reference, it is prudent to provide by a special stipulation on the case, that the reference shall not be defeated by the death of one of the parties before award made. *Id. ib.*

But if a stranger to the cause become by rule of court party to a reference to the cause before any jury is sworn, and if, after the award made, but before judgment, one of the parties to the cause die, though the cause abate, the rule of court is not defunct as to the stranger; but an attachment shall go thereon for non-performance of the award. *Rogers v. Stanton*, 7 *Taunt.* 575.

An executor may have, without *scire facias* or other process of revivor, an attachment for non-performance of an award made in his testator's cause in his life-time, in favour of the testator. 7 *Taunt.* 575.

A party having made his election by bringing an action on an award, will not be permitted to waive same and move for an attachment. *Badley v. Loveday*, 1 *B. & P.* 81.

If bail has been given in the cause proposed to be referred, a verdict should be taken for a certain sum, subject to the award under the order of reference, otherwise the bail will be discharged. 1 *Sel.* 467.

A judgment on a verdict reduced by an award may be entered up in the first instance. *Higginson v. Nesbitt*, 1 *B. & P.* 97.

Where verdict was taken by consent, subject to the award of an arbitrator, K. B. held that judgment cannot be entered up without the usual rule for judgment. *Hayward v. Ribbans*, 5 *East*, 310. But it does not seem settled whether the rule for judgment can be entered before the day on which payment of the sum awarded is to be made; at all events execution cannot be issued before that day. *Callard v. Patterson*, 4 *Taunt.* 319. No previous application to the court for leave to issue execution seems to be necessary. *Lee v. Linguard*, 1 *East*, 401. *Grimes v. Naish*, 1 *B. & P.* 480. *Borrowdale v. Hitchener*, 3 *B. & P.* 244. See *Reed v. Garnett*, *Bur.* 58, where it was held that the same affidavits are as necessarily to be made previously to taking out execution as on the proceeding by attachment on the award.

And where a verdict is taken, subject to an order of reference, if the arbitrator refuses to make his award, verdict cannot be entered without making the order of reference a rule of court. *Kirkus v. Hodgson*, 8 *Taunt.* 793.

The sum for which a verdict is nominally taken cannot be considered as in the nature of a penalty, for which the plaintiff may enter up for judgment, and levy interest, sheriff's fees, poundage, &c. The judgment can be entered up only for the sum found by the arbitrator. *Same cases cited above.*

An arbitrator cannot award a sum to be due beyond that for which a verdict shall have been taken. *Bonner v. Charleton*, 5 *East*, 139. *Prentice v. Reed*, 1 *Taunt.* 151. and if he do, assumption will not lie on the award, *Bonner v. Charleton*, *ubi supra*. But where an award was made and judgment entered up for more than taken by the verdict, and it appeared that the excess would be covered by a sum due, not however referred or in dispute, the court reduced the judgment to the amount of the verdict, and granted execution for the sum really due. *Prentice v. Reed*, *ubi supra*.

Where a replevin cause being referred after issue joined and before jury sworn, the arbitrator found one issue of the defendant, and awarded the payment of rent due to him, but ordered no verdict or judgment to be entered: Held, that the defendant was not entitled on motion to enter up judgment in the action, for the rent and costs of the action taxed for him. *Grundy v. Wilson*, 7 *Taunt.* 700.

As to election of remedy by action or by attachment.

Caution as to bail being lost.

When judgment reduced by an award, may be entered up. But rule for judgments is, necessary.

Cases as to taking out an execution.

For what sum the judgment may be entered up.

Arbitrators cannot exceed the verdict.

Omission to direct verdict to be entered up.

After such formal verdict, the award cannot be impeached after the first four days of the following Term. 3 B. & P. 244; and see the following case, where it was ruled in K. B. that the time limited by the statute of W. III. for setting aside awards made under submission by virtue of that statute, does not attach on awards made under orders of *nisi prius*. *Synge v. Jervoise*, 8 East, 466; *acc. Rogers v. Dallimore*, 1 Marsh. 471.

As to service of the award being unnecessary.

Personal service of the award is not necessary to warrant the issuing of an execution; if the defendant's attorney hath been served it is unnecessary. 3 B. & P. 244.

Where cause referred to arbitrators under a rule nisi, may be set down again.

If the cause be referred at *nisi prius*, and without any laches of the parties the arbitrators do not make the award, the cause may be set down again, and the costs incurred in consequence of this reference will follow the event. *Burchall v. Bellamy*, 4 Burr. 623. The principle seems to be acknowledged in *Lady Sadler's case*, 4 Burr. 1984.

Where the remedy on an award is by action.

If the agreement or obligation do not contain a clause for making the submission a rule of court, the remedy in case of disobedience to the award is by action on the same, or in covenant upon the agreement, or in debt upon the bond.

Where the award is required to be in writing under the hand of the arbitrator, it must be alleged in pleading to be under the hand as well as in writing. *Everard v. Patterson*, 6 Taunt. 645. Ex. Chamb.

As to stamp.

An improper stamp will not vitiate an award, unless an attempt be made to enforce it. *Preston v. Eastwood*, 7 T. R. 95. and unless it be delivered as a deed, it need not have a deed stamp. *Brown v. Vawser*, 4 East, 584. It is now considered as a deed. See tit. STAMP. Also, tit. TABLE OF STAMPS, *post*.

As to arbitrator's fee.

On reference under rule of court, it seems that the amount of the arbitrator's fee awarded to be paid to himself, is examinable by the prothonotary. *Fitzgerald v. Graves*, 5 Taunt. 342.

Where the award is lost.

If the award be lost, proceedings may be had upon an affidavit of the facts, and upon the draft or copy thereof. *Robinson v. Davis*, 1 Str. 526. See also upon an affidavit of its contents. *Hill v. Townshend*, 3 Taunt. 45. See the principle, *Rex v. Gwyn*, *ib.* 431.

No poundage due on attachment.

The sheriff is not entitled to poundage on an attachment. *Rex v. Palmer*, 2 East, 411. *Quære*, whether he can recover under 23 Hen. VI. c. 9.

Quære, as to swearing witnesses.

I do not find that either by the statute, or that in practice an arbitrator is authorized to administer an oath to the parties. *Quære* therefore, whether in all cases it be not better, previously to the arbitration being entered upon, that the submission be made a rule of court; this being done, gives the court jurisdiction, and witnesses may be regularly sworn; but it would hardly be prudent to assert that perjury would lie against witnesses sworn even in court, before the court had jurisdiction. This very important question is by practical writers untouched. There seems no rule laid down as to the means by which witnesses may be compelled to attend the reference. See Practical Directions, where the proceeding is under order of *nisi prius*, *post*.

PRACTICAL DIRECTIONS, K. B.

*See Forms subjoined, Nos. 1. 3. The bonds or agreement to refer all matters in difference, &c. being executed, the mode of attendance on the arbitrators, and procuring and adducing the testimony of the witnesses, are points entirely independant of any other regulation or practice than what the situation and circumstances of the parties will dictate; the more especial directions, therefore, will be confined to making the submission a rule of court; to enforcing the same when award shall be made, whether by attachment or other proceeding thereon; to the resisting the award, if it shall have been illegally or irregularly made; and lastly, to the course of proceeding where the reference shall have been made by an order of *nisi prius*, or by a judge at chambers.*

The award will appoint a time and place for a payment to be made, a chattel to be delivered, or for other matter to be done; the proper party will therefore have attended; and, in default of the performance of the award, the first step taken to enforce it, is

To make the submission a rule of court.

Let the subscribing witness make affidavit of the due execution of the bond or agreement, whereby it was agreed that the submission should be made a rule of court. Stamp, 2s. 6d., oath, 1s.—See No. 2, FORM subjoined.

The affidavit, previously to the rule, cannot be entitled in any cause.

*Give same to counsel; indorsed "to move to make the within mentioned submission a rule of court"—fee 10s. 6d. The clerk of the rules draws up the rule; pay 2s. per sheet, besides duty; make copy of rule, and of the award, verbatim; these copies must be served by the party claiming the performance of the award on the party by whom it is to be performed, personally. *Hilton v. Hopwood*, 1 Marsh. 66. and it is said that service on a Sunday, is good. *Anon*, 12 Mod. 158. At the same time, and by the same party, personal demand is to be made of the sum or other matter awarded. And observe, if necessary, the point in *Standley, esq. v. Hemmington*, Marsh. 266. S. C. 6 Taunt. 571.*

Yet the party desirous of enforcing the award may be unwilling personally to make the demand; in this case he may empower another to make it for him by regular power of attorney; his execution of such instrument, in case of subsequent proceedings, must be verified by the affidavit of the subscribing witness.—See FORM subjoined.

If the party keep out of the way to avoid such personal demand, or if he cannot be found, an affidavit of the facts may be made, and the court will grant a rule to shew cause why leaving copies of the award, rule, and allocatur at his house, and demanding the money of his wife, should not be deemed good service.

*If on such demand the award shall not have been performed, the next step to enforce the same is as follows: let the same party making the demand, and serving the copies as above-mentioned, proceed to make an affidavit of such service and demand; an affidavit of the due execution of the award by the arbitrator or umpire must also be made; give the affidavits to counsel, 10s. 6d. indorsed "to move for a rule to shew cause why an attachment should not issue for not paying the money on the award, in pursuance of the rule of court." The clerk of the rules draws up the rule; pay 2s. per sheet; serve copy thereof; and this also requires to be personally served. *Matthews v. Pizzey*, MS. Easter Term, K. B. 57 Geo. III. If the party still refuse, make affidavit of the service of the copy of such rule; annex the original rule to the affidavit; give same to counsel, indorsed, "to move to make the within*

ARBITRATION; FORMS.

to remain in full force and virtue: And the said *J. D.* doth consent and agree, that his submission to the award or umpirage above mentioned, shall be made a rule of his majesty's court of King's Bench at Westminster, pursuant to the statute in such case made and provided.

Sealed, &c.

J. D.

Each party executes a bond *mutatis mutandis*, to be exchanged forthwith.

[Court.]

No. 2.
Affidavit of due
execution
thereof.

T. S. of ———, maketh oath and saith, that he was present at the time of signing and sealing the bond or obligation hereunto annexed; and that *J. D.* of ———, therein mentioned, did duly sign, seal, and as his act and deed deliver the said bond, in the presence of this deponent; and that the name *J. D.* set and subscribed to the said bond, is of the proper hand-writing of the said *J. D.* and that the name *T. S.* set and subscribed as the witness thereto, is of the proper hand-writing of this deponent.

Sworn, &c.

T. S.

Note.—Not to be entitled, if proceeding under the statute.

Middlesex, to wit.

No. 3:
Order of refer-
ence at *nisi prius*.

At the sitting of *nisi prius*, held at Westminster Hall, in and for the county of Middlesex, on the ——— day of ———, in the year of our Lord ———, and in the ——— year of the reign of our sovereign lord George the Fourth, now king of the united kingdom of Great Britain and Ireland, &c. before the right honourable Sir Charles Abbott, Knt. chief justice of our lord the king, assigned to hold pleas before the king himself.

J. D. } *It is ordered* by the court, by and with the consent of the
v. } plaintiff and defendant, their counsel and attornies, that the
R. R. } last juryman sworn and impanelled in this cause, be with-
drawn out of the panel, and that all matters in difference between
the said parties be referred to the award, order, arbitrament, final
end and determination of ———, so as he shall make and publish
his award in writing of and concerning the premises in question, on
or before the ——— day of ——— term now next ensuing; and that
the said parties shall and do perform, fulfil, and keep such award, so
to be made by the said arbitrator as aforesaid; and it is also or-
dered, by and with such consent as aforesaid, that the costs of the
said cause shall abide the event and determination of the said award,
and that the costs of the said reference shall be in the discretion of said
arbitrator, who shall direct and award by whom, and to whom, and
in what manner the same shall be paid: and it is likewise ordered, by
and with such consent as aforesaid, that the plaintiff and defendant
respectively shall be examined upon oath, to be sworn before the said
lord chief justice, or some other justice of the same court of our
lord the king, before the king himself, or before a commissioner ap-
pointed for taking affidavits in the country, if thought necessary by
the said arbitrator, and do produce before the said arbitrator, all
books, papers, and writings touching and relating to the matters in
difference between the said parties, as the said arbitrator shall think
fit; and that the witnesses of the plaintiff and defendant respectively
shall be examined upon oath, to be sworn before the said lord chief
justice, or some other justice of the same court of our lord the king,
before the king himself, or before such commissioners as aforesaid;
and it is likewise ordered, by and with such consent as aforesaid,
that neither the plaintiff nor the defendant shall prosecute or bring

any action or suit in any court of law or equity against the said arbitrator, or bring or prefer any bill in equity against each other, of and concerning the premises in question, so as aforesaid referred: *and it is further ordered*, by and with such consent as aforesaid, that if either party shall, by effected delay, or otherwise, wilfully prevent the said arbitrator from making an award, he shall pay such costs to the other as the said court of our said lord the king, before the king himself, shall think reasonable and just: *and lastly, it is ordered*, by and with such consent as aforesaid, that the said court of our said lord the king before the king himself, may be prayed, that this order may be made a rule of the same court.

[Court.]

[Title cause.]

T. S. maketh oath and saith, that this deponent did see *X. Y.* of ———, sign, seal, publish, and declare his final award and arbitration in writing between *J. D.* of ———, and *R. R.* of ———, bearing date the ——— day of ———; and this deponent further saith, that the name *X. Y.* set and subscribed to the said award, as the party executing the same, is of the proper hand-writing of the said *X. Y.* and that the names *T. S.* and *E. S.* set and subscribed thereto, as witnesses attesting the execution of the said award, are of the respective hands-writing of this deponent and the said *E. S.*

Sworn, &c.

T. S.

See Mem. subjoined to FORM, No. 2.

[Court.]

[Title cause.]

J. D. of ———, maketh oath and saith, that this deponent did, on the ——— day of ——— last, personally attend from the hour of ———, until the hour of ———, in the forenoon of the same day, at ——— (*here insert the time and place mentioned in the award*) for the purpose of receiving the sum of £——, awarded to this deponent, pursuant to a certain award in writing, which is hereunto annexed, but the said *R. R.* did not attend at the time and place aforesaid, or pay to this deponent the said sum of £——, or any part thereof: and this deponent further saith, that on ——— next after ———, in this present ——— term, the submission of this deponent and the said *R. R.* to the said award, contained in a certain bond or obligation, bearing date the ——— day of ———, was made a rule or order of this honourable court, and that this deponent did, on the ——— day of ——— last, personally serve the said *R. R.* with a true copy of the said rule or order, and award, and at the same time shewed him the said original rule or order, and award, and demanded of him the payment of the said sum of £——, so awarded to this deponent as aforesaid: but the said *R. R.* did not then, or at any time afterwards, pay the same, or any part thereof, to this deponent, and the said sum of £——, now remains wholly due and owing from the said ——— to this deponent.

Sworn, &c.

J. D.

See Mem. subjoined to FORM, No. 2.

[Court.]

[Title cause.]

J. D. of ———, the plaintiff in this cause, maketh oath and saith, that this deponent, on the ——— day of ——— last, personally served the above named defendant with a true copy of the rule and *allocatur*, and also a true copy of the award hereunto annexed, and at the same time shewed him the said original rule, *allocatur*, and award, and demanded of him the payment of the sum

No. 4.

Affidavit of due execution of the award.

No. 5.

Affidavit of demand and refusal, in order to ground an attachment.

No. 6.

Affidavit of demand and refusal of the sum awarded, and of the taxed costs.

of £ ———, awarded to this deponent by X. Y. of ———, the arbitrator named in the said award, and also the payment of the sum of £ ———, for the costs allowed to this deponent, in the said cause: but the said defendant refused to pay the same, or any part thereof: and this deponent further saith, that the said sums of £ ——— and £ ———, still remain wholly due and owing from the said defendant, to this deponent.

Sworn, &c.

J. D.

ARGUMENT. See titles DEMURRER, ERROR, *post*.

ARRAY, *Challenging*. See tit. JURY, *post*.

ARREST FOR DEBT. Arrest is the apprehending or restraining the person by process in execution of the command of some court or officer of justice. *Wood's Inst.* 575.

For what amount
arrest may be
made.

The cause of action must amount to 15*l.* unless upon bill of exchange or promissory note; and these amounting to 10*l.* the arrest is good for such sum. See stat. 51 G. III. c. 124; and an affidavit of the amount of the cause of action must be duly made, and the amount indorsed on the back of the writ. *Ib.* s. 2. and although the plaintiffs recover under 15*l.* yet this statute does not avoid the proceedings. *Spinks v. Hitchcock*, 7 *Taunt.* 135. but if the arrest be intended to be made in Wales, or in the counties palatine, by process out of the courts of K. B. and C. P. the cause of action must be sworn to amount to 20*l.* and upwards. 11 & 12 W. III. c. 9. s. 2. Where a plaintiff, shortly previous to making an affidavit of debt, had written a letter, stating that defendant was a creditor of his, the court interfered in a summary way to discharge the defendant out of custody, on affidavit denying the debt, the plaintiff not having denied the writing of such letter by him, or alleging that the debt due to him had arisen subsequently to it. *Nizetich v. Bonacich*, 5 B. & A. 904. See titles SAILOR, SOLDIER, &c., *post*, in the alphabetical abridgment subjoined to this head and title.

Stat. 43 G. 3.
c. 46.

The provisions of statute 43 G. III. c. 46. are remarkably favourable to the person of a debtor. By this statute he cannot be "arrested in England or in Ireland, for a cause of action not originally amounting to such sum for which such person is, by the laws now in being, liable to be arrested and held to bail, over and above, and exclusive of, any costs, charges, and expences, that may have been incurred, recovered, or become chargeable, in or about the suing for, or recovering the same, or any part thereof."

Deposit in lieu
of bail.

And by sect. 2. of the same act, all persons arrested in England and Ireland, shall be allowed, in lieu of giving bail, to deposit with the sheriff, by delivering to the undersheriff, &c. the sum endorsed upon the writ, together with 10*l.* in addition, to answer the costs, and also such further sum as shall have been paid for the king's fine upon an original writ. Defendant to be discharged on such deposit; which sum the sheriff is, at or before the return of the writ, to pay into court.

If defendant afterwards duly perfect bail, the whole sum so deposited, to be on motion repaid him; but if defendant do not duly perfect bail, the money is to be paid to the plaintiff on like motion, and who may then enter a common appearance, if he think fit. The 10*l.* to be paid subject to such deductions, if any, from the 10*l.* deposited to answer the costs of the suit and of the application, as may upon taxation be found reasonable. And by the 3d section the defendant is entitled to costs, if the plaintiff do not recover the amount for which he was arrested.

If a defendant, who pays the debt and 10*l.* costs, under this act, put in bail above, who, instead of justifying, render him (the plaintiff), is not, under *sect. 2.* entitled to receive the money so deposited, but the defendant may, in such case, receive back his deposit. *Harford and others v. Harris*, 4 *Taunt.* 669. See also *Cadby v. Carsons*, 5 *Id.* 623; and *Chadwick v. Battye*, 3 *M. & S.* 283. 1 *Chit. R.* 145. *acc.*

Where upon a bond in a penalty conditioned for paying a less sum by instalments and interest, the defendant is arrested for the aggregate amount of all the instalments and the interest accrued due before the action brought, and that although only a part of the instalments was then due, the defendant has no remedy for his costs under the statute. *Talbot v. Hodsden*, 7 *Taunt.* 251. And see *tit. COSTS, post.*

Wherever a claim or debt, amounting to or above 15*l.* is matter of certainty, and for which an action will lie, an arrest may be made for the same, subject to exceptions in relation to persons of a known character or office, most of whom are mentioned in an alphabetical list subjoined to this article.

For what cause a person may be arrested or detained, &c.

So, also in cases where a bill or note amounts to 10*l.*

But previously to arrest, in some cases, a judge's order must be obtained. *e.g.* By R. G. II. 48 G. III. c. 9. 9 *East*, 325. 1 *Taunt.* 203, no person can be held to special bail in an action of trover or detinue, without an order made for that purpose by the lord chief justice, or one of the judges.

Defendant may be arrested in an action on judgment, where he was not held to bail in the first action. 1 *Chit. R.* 274. n.

Where the first action is not bailable, the court will not set aside a second arrest for the same cause of action, though the first were pending. *Davison v. Cleworth. Id.* 275. n.

Where a defendant had been twice arrested in two different counties, for the same cause of action, and had put in bail to two writs, the court refused to grant a rule absolute for setting aside one of two actions brought against the defendant, as there was in fact but one action, and the proper course was to move that an *exoneretur* might be entered on the bail piece. *Powell v. Henderson. Id.* 392.

A defendant, wrongfully arrested, is not entitled to be discharged from subsequent detainers, unless there has been collusion between the plaintiffs in those causes, and the persons by whom the defendant was originally arrested. *Barclay and others v. Faber*, 2 *B. & A.* 743; and see *Callaway v. Bond*, 1 *Chit. R.* 580. n.

And where a defendant being previously in custody, in execution for a debt, a detainer was lodged against him, but for too large a sum; and on this being discovered in a few hours, the plaintiff discontinued on payment of costs, and before the payment of costs lodged a fresh detainer: Held, that this second detainer was regular, and that it was not like the case of a fresh arrest which cannot be made till the costs have been paid. *White v. Gompertz*, 5 B. & A. 905.

A defendant is not entitled to be discharged out of custody, on the ground of his having been arrested upon a warrant in which the names of the plaintiffs are not conformable to the writ, if the defendant be not misled by the mistake; and therefore where the arrest took place on a warrant, which required the defendant to answer *A. B. and two others*: Held, that he was not entitled to be discharged. *Williams v. Lewis*, 1 Chit. R. 611.

Where not.

But it has been ruled, that the defendant cannot be holden to bail in an action on a policy of insurance, where there has been no adjustment, because it is an action to recover unliquidated damages. *Lear v. Heath*, 5 Taunt. 201. See also 1 Marsh. 21. n.

And this, although the plaintiff swear to a total loss. *Id.* And although the defendant make an unqualified offer to pay 80l. per cent. 5 Taunt. 201.

But where *A.* proceeds, by foreign attachment, against *B.* who surrenders, and pleads to the jurisdiction of the court, *A.* discontinues the foreign attachment, and arrests *B.* by process out of this court: Held, that the foreign attachment was not such an arrest as to entitle *B.* to be discharged out of custody in the present suit on entering a common appearance. *Wood and others v. Thompson*, 1 Marsh. 395.

The sheriff is, not the plaintiff, subject to the costs of an illegal arrest, unless the plaintiff were privy. 1 Chit. R. 580. n.

An arrest in the city of London, on a bill of Middlesex, is irregular, even though it took place on the verge of the county of Middlesex, if there be no dispute as to the boundaries. *Hammond v. Taylor*, 5 B. & A. 408.

The second arrest must be vexatious, in order to induce the court to discharge the defendant. *Per cur.* 1 Chit. R. 276.

A defendant who has been arrested in a foreign country, may be arrested here again for the same cause of action. *Maule v. Murray*, 7 T. R. 470.

So, may be arrested in any court at Westminster, after having surrendered in discharge of a foreign attachment, in an action in the Lord Mayor's Court of London, for the same cause. *Wood v. Thompson*, 1 Marsh. 395. 5 Taunt. 851. S. C. or after having put in bail on same attachment for same debt. *Id. ib.*

And it should seem therefore, that defendant may be arrested a second time, in a court which proceeds by different modes of redress, from that in which the first action was brought. 1 Chit. R. 274. n.

A second arrest
for the same
debt.

Where it appeared that bail in the cause in which the first arrest had been made were forsworn, the court refused to assist the defendant on the second arrest, the first action being discontinued.

Olmus v. Delany, *Str.* 1216; but notwithstanding the case cited, it may be doubted whether, without previously to the second arrest putting the court in possession of all the grounds upon which the first action might have been discontinued, the court would interfere. *Belcher v. Gansell*, 4 *Burr.* 2502. And the costs of the first action must be first paid. *Molling and others, assignees, &c. v. Buckholtz*, 3 *M. & S.* 153. See tit. DISCONTINUANCE, *post*. Yet I have understood, but not upon distinct authority, that where the bail are manifestly perjured, the court has lately, (1823) interfered in case of a second arrest.

In case of a first arrest, if a bill which is given in payment do not turn out to be productive, it is not that which it purports to be, and the defendant may be again arrested on a new writ on the same affidavit. *Puckford v. Maxwell*, 6 *T. R.* 52. and also, 2 *Chit. R.* 274.

After *non pros*, for want of declaring and payment of costs, it was said, that plaintiff may again arrest defendant for the same cause of action. *Turton v. Hayes*, 1 *Str.* 439. But in a later case, Lord Ellenborough said, "It is harsh enough to deprive men of their liberty as a security for debt in the first instance; but after having continued the defendant in custody, until the plaintiff lost the benefit of it by his own default, I shall require a very strong case to induce me to consent to a further imprisonment;" and in the same case, Lawrence, J., said, "However ill the defendant may have behaved, we are not to punish him by confining him in prison upon a second arrest for the same cause as before." *Imlay v. Ellefsen*, 3 *East*, 309.

On nonsuit on an informality, the defendant may be again arrested. *Kearney v. King*, 1 *Chit. R.* 273. so also if discharged on an illegal warrant. *Housin v. Barrow*, 6 *T. R.* 218.

So also, where judgment has been recovered in error. *Cartwright v. Keely*, 7 *Taunt.* 192.

But if arrested by a wrong christian name the court will not discharge him on motion. And the sheriff is liable to an action. *Wilks v. Lorck*, 2 *Taunt.* 399. but here the application was made before the time for pleading in abatement had expired. *Smith v. Jones*, 4 *B. & P.* 360. *acc.* See tit. MISNOMER, *post*. Also *The King v. The Sheriff of Surrey*, 1 *Marsh.* 75. though where there is only inaccuracy in the spelling, so that the name is still *idem sonans*, the court will not interfere. *Ahitboll v. Beniditto*, 2 *Taunt.* 401. Nor where "rum," in the affidavit, was stated as the last syllable of the defendant's name, instead of "run." *Anon.* 1 *Chit. R.* 660. n., nor where the variance was "Reunoll" for "Rennolls." *Id.* 659. n.

But arrest by initials of christian name, is bad. *Reynolds v. Hamlin*, 4 *B. & A.* 563.

Where the action is compromised, and a second arrest is made for the same cause, the court will not set aside bail-bond, unless proceedings are vexatious. *Brown v. Davis*, 1 *Chit. R.* 161.

After discontinuance of former actions, and after the costs have been taxed and paid, second arrest good. *Id.* 274. n.

As to second arrest.

Defendant may be arrested by assignees of bankrupt, although he was arrested by bankrupt for same cause, if it was necessary to discontinue the first action, on the ground of the bankruptcy. 1 *Chit. R.* 274. n.

Defendant who pleads non-joinder in abatement, to an action in which he was arrested, may be again arrested in a new action against all the contractors. *Id. ib.*

So where cause is referred to arbitration, defendant may be arrested on the award, though he was arrested on the original action. *Id. ib.*

When the first action is brought in the name of the bankrupt, without the authority of the assignees, it seems that the defendant may be arrested a second time, without the first being discontinued or the costs paid. *Id.* 276. n.

Where a defendant is let out of custody at his own request, in order that he may attend to his business, he may be again arrested on the same affidavit. *Penfold v. Maxwell, Id.* 275. n.

But he cannot be arrested a second time after a discontinuance of the first action, until costs are taxed. *Id. ib.*

Nor after having been superseded through plaintiff's laches in the first action. *Id.* 274. n.

Nor where first action was discontinued, because brought before the credit had expired. *Id. ib. Wheelright v. Joseph, 5 M. & S.* 93.

Nor can bankrupt, and insolvent debtor be arrested, on promise to pay debts from which they have been discharged. 1 *Chit. R.* 274. n.

Nor where the defendant has been arrested in an action brought in the name of a bankrupt, by the authority of the assignees, can he afterwards be arrested at their suit for the same cause of action, when the first action has not been discontinued, or the costs paid. *Carter v. Hart, Id.* 276.

Nor where the defendant has signed wrong name in dealing. *Walker v. Willoughby, 6 Taunt.* 530.

No person can be arrested in the king's presence; nor in the king's court, the court sitting; nor in the verge of the royal palace, except by writ issuing out of the palace court, and against a person not of the household. *The King v. Stobbs, 3 T. R.* 735.

By 11 & 12 *W. III. c. 9. s. 2.* no sheriff, &c. within the principality of Wales, or counties palatine, upon any writ or process issuing out of any of his majesty's courts of record at Westminster, shall hold any person to special bail, unless an affidavit be first made in writing, and filed in the court out of which such writ or process is to issue, signifying the cause of action, and that the same is 20*l.* and upwards, and where the cause of action is 20*l.* and upwards, bail shall not be taken for more than the sum expressed in such affidavit.

Within the walls of a prison no person can be arrested; a detainer must be lodged. *Wilkinson v. Jaques, 3 T. R.* 392.

No person actually and *bonâ fide* attending a cause, having relation thereto, whether compelled by process or not, can be arrested there, nor coming nor going. 1 *H. Bl.* 636. *Spence v. Stuart, Bart. 3 East,* 89.

Who can and who cannot be arrested.

And the Insolvent Debtor's Court is one within the privilege. *Willingham v. Matthews*, 6 *Taunt.* 356.

So a plaintiff, while waiting in the vicinity of the court, in expectation that his cause would be tried, is privileged from arrest. *Childerston v. Barrett*, 11 *East*, 439. See also, *Soloman v. Underhill*, 1 *Campb. N. P. R.* 229. and the judge at N. P. will grant a *habeas corpus* to discharge him, and put off the trial until he is released, without payment of costs, if any collusion can be shewn to exist between the opposite party and the creditor who arrested him, otherwise only upon payment of costs.

A capital burgess of a borough, attending an election of co-burgesses, under a summons from the mayor, issued in obedience to a mandamus, directing the corporation to proceed to such election, is not privileged from arrest during his attendance there for that purpose. *Nixon v. Burt*, clerk. *Reed v. Same*, 1 *J. B. Moore*, 413.

Nor is a servant of a peer privileged from arrest. 1 *Chit. R.* 83.

After a voluntary escape the sheriff cannot again arrest the prisoner. *Atkinson v. Jameson*, 5 *T. R.* 25. but on a wrongful escape he may, even on a Sunday. S. C.

An arrest, in the practical sense here intended, is made in pursuance of the king's writ or process directed to the sheriff or other proper officer, commanding him to take the person of the party therein named, and to keep him for the purpose and according to the terms specified in said writ or process. Who may arrest.

The sheriff usually executes this command or writ by his warrant under the seal of his office, directed to persons who are called bailiffs or sheriff's officers; and these are persons whose office, habits, and manners, are sufficiently known. Of bailiffs generally.

But a warrant made to four jointly, and not severally, will not authorize an arrest by one. *Boyd v. Durand*, 2 *Taunt.* 161. but defendant will not be discharged on motion. *Id. ib.* the warrant being good, though ill pursued, *Ibid.* And see *Housin v. Barrow*, 6 *T. R.* 122.

And bailiff cannot arrest the defendant before warrant made out. *Hall v. Roche*, 8 *T. R.* 187.

Though bailiffs are public officers, any person on proper application, may procure the warrant to make the arrest, to be specially directed to himself; the occasions for this departure from the ordinary course of business, do not often occur, and no other particular practical information as to the propriety or impropriety of this special nomination can be given, save what will suggest itself to the practitioner or his client, at whose instance such special nomination may be required. If required and granted by the sheriff, to whom the application for that purpose is to be made, it will be prudent to keep in mind, that the sheriff cannot be ruled to return the writ. *Gentleman v. Bright*, *Bar.* 416. See, however, *Royston v. Reed*, *ib.* 411. *Hamilton v. Dalziel*, 2 *Bl. R.* 952, whether it be a writ of execution or on *mesne* process. *De Moranda v. Dunkin*, 4 *T. R.* 119. See later cases under tit. ATTACHMENT AGAINST SHERIFF. See also, titles EXTORTION, GAOLER, *post*.

Exclusively of sheriffs, officers of particular liberties have this right to make arrests, secured to them by 5 G. II. *Hall v. Wilby*,

Bar. 404, but this act does not extend to counties palatine. *Griffin v. Alcock*, *Id.* 400, cited 1 *Sel.* 122, though no such case appears.

In counties palatine, the officer to whom the writ is directed, issues his mandate to the sheriff, who causes the arrest to be made, as if the writ were originally directed to him.

In a liberty, the sheriff issues his mandate to the particular bailiff of such liberty, who makes the arrest.

But where a *non omittas*, which see, issues, the sheriff or his bailiff may enter the liberty; and in case he enter without such a writ of *non omittas*, the arrest is good, though the sheriff is liable to an action. *Gilb. C. P.* 29.

The arrest may be made by the *authority* of the bailiff; so that he be in some way acting in the arrest, he need not be actually in sight. *Blatch v. Archer*, 1 *Cowp.* 65.

How.

Touching the person was held to be essential. *Genner v. Sparks*, 6 *Mod.* 173. and having so done, the bailiff may break open a door to secure the defendant. 6 *Mod.* 105. and, as in the memorable case of *Lee v. General Gansel*, the bailiff having gained peaceable entrance at the *outer*, may break an *inner* door. 1 *Cowp.* 1. So a window. See *Lloyd v. Sandilands*, 2 *J. B. Moore*, 197. But it has been said by great authority (Lord Hardwicke), that if a bailiff come into a room, and tell the defendant he arrests him, and locks the door, that is an arrest, for he is in the custody of the officer. *Rep. Temp. Hardw.* 301. In *Hall v. Roche*, Lord Kenyon, C. J., said, "It is very important that in all cases where an arrest is made by virtue of a warrant, the warrant (if demanded, at least) should be produced." 8 *T. R.* 188.

As to bailiff's
shewing warrant.

But a sheriff cannot justify breaking the inner doors of the house of a stranger, *upon suspicion* that a defendant is there. *Johnson v. Leigh*, 6 *Taunt.* 246.

When.

It cannot be made on a Sunday, 29 *Car.* II. c. 2. s. 6. nor after the return day, and if the writ be returnable on a Sunday, it must be executed at latest on the Saturday before. *Loveridge v. Plaistow*, 2 *H. Bl.* 29. n.

Fees for arrest.

The master allows 10s. 6d. for an arrest in town, and 1l. 1s. in the country, and 1s. per mile for taking the defendant to gaol, if any distance.

Bailiffs cannot receive more than the settled fees for an arrest without being guilty of extortion. *Boldero and others v. Morse* and others, 3 *T. R.* 417.

And the Exchequer of Pleas will, on motion, refer the question of fee to the master, and order the bailiff to restore surplus and pay costs. *Watson v. Edmunds*, 4 *Price*, 309.

See tit. BAIL BOND, *Assignment of, post.*

Alphabetical List of Persons exempt, or not, from Arrest in Civil Cases.

ADMINISTRATOR, *as such.*

AMBASSADOR and Servants.

ATTORNEY; but see *Rex v. Priddle*, M. 27 G. III. K. B. 1 *Tidd*, 222. and tit. ATTORNEY, *post.*

BAIL; being about to justify, or otherwise attending court as bail. *Meekins v. Smith*, 1 *H. Bl.* 636. Who exempt from arrest or not.

BANKRUPT for forty-two days, unless before in prison, and after forty-two days if the time for surrender be enlarged. *Davis v. Trotter*, 8 *T. R.* 475.

Also, if summoned before the commissioners relating to his estate, though several years after his last examination. *Arding v. Flower* and another, *Id.* 534.

Nor on a promise to pay a debt from which he had been discharged. 1 *Chit. R.* 274. n.

BARRISTERS, attending court or on circuit. *Meekins v. Smith*, 1 *H. Bl.* 636.

BISHOPS.

CLERGYMEN attending divine service.

CLERKS of the courts at Westminster.

CONSUL-GENERAL. *Marshal v. Cretico*, 9 *East*, 447. *Sed quare?* *Clark v. Same*, 1 *Taunt.* 106, decided that he is not privileged. And see the very elaborate judgment, that he is not, *Oweash v. Becket*, 3 *M. & S.* 284.

CONVOCATION, Member of.

CORPORATION, Members of, *as such*.

DEFENDANT, attending his cause in court? See tit. **PLAINTIFF** in this Table.

DRUMMER. See title *Soldier*, *post*.

EXECUTOR, *as such*.

FEME-COVERT. *Edwards v. Rourke and Wife*, 1 *T. R.* 486. *Pritchett, q. t. v. Cross*, 2 *H. Bl.* 17; but if she obtain credit, pretending to be single, she may be arrested. *Partridge v. Clark*, 5 *T. R.* 191. *Collins v. Rowed*, 1 *N. R.* 54. though if a foreigner, and her husband be abroad, she is liable for her debts, although neither separated by deed nor having a separate maintenance. *Burfield v. Duchesse de Pienne*, 2 *New R.* 380.

But if the plaintiff knew her to be married, she will be discharged. *Waters v. Smith*, 6 *T. R.* 451. *March v. Capelli*, 1 *East*, 17. n. *Wardell v. Gooch*, 7 *East*, 582. And if knowingly, the plaintiff will be ruled to pay the costs of the motion. *Wilson v. Serres*, 3 *Taunt.* 307. but if she cohabit with another man, and trade on her own account, she will not be discharged. *De Gaillon v. L'Aigle*, 1 *B. & P.* 8.

If she state, mistakingly, her husband to be dead, she will be discharged. *Pitt v. Thompson*, 1 *East*, 16.

HEIR, *as such*.

HUNDREDOR, *as such*.

INSOLVENT DEBTOR, distress under 54 *G. III. c.* 28. *Wilson and another v. Kemp*, 3 *M. & S.* 595. But where he has made a subsequent promise, not exempt. *Horton v. Moggridge*, 6 *Taunt.* 569. But see 1 *Chit. R.* 274. n.

IRISH PEER; whether a representative or not. See tit. **PEER** of Ireland, in this Table, *post*.

Who exempt
from arrest or
not.

ARREST; TABLE; ARREST OF JUDGMENT.

MARSHAL OF THE KING'S BENCH PRISON.

OFFICERS, NON-COMMISSIONED. Such as Gunners, Serjeants, Drummers. But they must take advantage of this privilege in proper time. See *Bryan v. Woodward*, 4 *Taunt.* 557.

PARLIAMENT, MEMBER OF, for forty days after prorogation, and for the same period before the next meeting.

PEER of the Realm.

PEER of Ireland, whether representative or not, by stat. 59 & 40 G. III. c. 67. Art. IV.

PEERESS by birth or marriage; but who, if by marriage, loses her privilege if she afterwards intermarry with a commoner. *Co. Lit.* 16. 2d *Inst.* 50. 4 *Rep.* 118. *Dyer*, 79.

PLAINTIFF, attending the execution of a writ of enquiry. *Walters v. Rees*, 4 *J. B. Moore*, 34. So, generally, attending his cause in court.

SAILOR, under 20*l.* 1 *G. II. stat.* 2. c. 14. s. 15. 32 *G. III. c.* 33. s. 22.

SERJEANT. See tit. Soldier. But *Volunteer Drill Serjeants* are not exempt. *Rickman v. Studwick*, 8 *T. R.* 105.

SERVANT to Ambassadors.

———— to the King. *Bartlett v. Hebbes*, 5 *T. R.* 686. although trading. *King v. Foster*, 2 *Taunt.* 167.

SOLDIER, enlisted, under 20*l.*

SUITOR to a Court of Justice. *Childerston v. Barratt*, 11 *East*, 439. *Soloman v. Underhill*, 1 *Camp. Ni. Pr. R.* 229. And the Insolvent Debtor's Court is a court of justice within the rule. *Willingham v. Matthews*, 2 *Marsh.* 57. See also 2 *Rose*, 24. as to discharge from arrest, made while attending to prove a debt under a commission of bankruptcy. See *Tidd*, 204.

WARDEN OF THE FLEET PRISON.

WITNESS subpoenaed.

———— summoned before commissioners under the Great Seal.

———— an arbitrator appointed by the Court of Chancery. *Randall v. Gurney*, 1 *Chit. R.* 679. 3 *B. & A.* 252. S. C.

But he must not delay by the way. *Id. ib.* K. B. *contra*, Exchequer of Pleas. *Id. ib.* 682. 7 *Price*, 699. S. C.

What.

ARREST of JUDGMENT. The act of the court, whereby, on motion, final judgment is stayed for a cause *appearing* on the face of the record itself. *Pechey v. Harrison*, 1 *Ld. Raym.* 232.

When the motion to be made.
K. B.

The time for moving in arrest of judgment, is limited to the first four days in full term; i. e. to the time of the expiration of the rule for judgment; or it may be made any time before the signing of final judgment. *Taylor v. Whitehead*, *Dougl.* 745.

If the *postea* be returnable; (or the inquisition), the last day of the term, a rule for judgment may that day be given, if the proceeding be by bill, and the motion for arrest of judgment must be made on that day. *Lill. Pr. Reg.* 120. tit. JUDGMENT.

In Exchequer of Pleas, motion not permitted after the expiration of the first four days next after the trial of the cause, and a rule *nisi* for a new trial has been discussed. And it further appears, that such a motion should be made in the alternative in the first instance. *Lane v. Crickett*, 7 *Price*, 566.

The time for making such motion is before or upon the appearance-day of the *habeas corpora juratorum*; *Lyte v. Rivers*, *Bar.* 445. and if that day shall be the last day of term, notice of the motion shall be given, and an affidavit of the service must be produced, or the rule for staying the judgment will be refused. *Camp, q. t. v. Gale*, *Id.* 247.

When.
C. P.

Material misrecital of a statute, is ground. *The King v. Marsack*, 6 *T. R.* 771.

Quare, Where the misrecital is merely literal? *Id.* 776.

Whatever will be a cause for arresting the judgment, must also be a cause for demurrer; but it will not equally hold, that whatever is cause of demurrer, may be cause for arresting the judgment. A verdict will aid a title defectively set forth, but not a defective title, 1 *Sel.* 498. *Weston v. Mason*, *Bur.* 1725. *English v. Burnell*, 2 *Wils.* 258. See also *Macmurdo v. Smith*, 7 *T. R.* 518.

Grounds on
which judgment
may be arrested.

Where the verdict does not pronounce upon the point in issue, judgment will be arrested. *Bishop v. Kaye*, 3 *B. & A.* 605.

So where the *innuendo* is not warranted by the words of the *colloquim*. *Gainsford v. Blachford*, 7 *Price*, 544.

So, circuity of action is a ground. *Bishop v. Hayward*, 4 *T. R.* 470.

A plaintiff declared as administrator of an executor, when administration *de bonis non* ought to have been taken out. *Bastard v. Jutsham*, *Bur.* 444.

Also, where the one joint obligor only was sued, it appearing on the face of the declaration that the bond had been given by two. *Horner v. Moor*, cited in *Rice v. Shute*, 5 *Burr.* 2614.

Also, where it was said "divers goods," without specifying what goods. *Wiatt v. Essington*, *Ld. Raym.* 1410.

Also, where *entire* damages are given upon a declaration containing two counts, one of which alleges a cause not actionable, the practitioner should therefore be careful to get the damages assessed, on the verdict given on the good count. *Onslow v. Horne*, clerk. (Tooke) 3 *Wils.* 177. And see *Holt v. Scholefield*, 6 *T. R.* 691. And it seems that the very words upon which special damage is stated in one count, must be set out; and if omitted, such count, joined with others, to which no objection is taken, will be a ground for arresting the judgment upon a general verdict. *Cook v. Cox*, 3 *M. & S.* 110.

But if there be a misjoinder of counts, and a verdict for the plaintiff, on the counts well joined, and for the defendant on the other, the misjoinder is not a cause for arresting the judgment. *Kighley v. Birch*, 2 *Id.* 533.

After judgment on demurrer, there can be no motion in arrest of judgment, on account of matter which might have been stated on arguing the demurrer. *Edwards v. Blunt*, 1 *Str.* 425. *Creswell v. Packham*, 2 *Marsh.* 326. *acc.* 6 *Taunt.* 650. S. C.

ARREST OF JUDGMENT; PR. DI. K. B.

Also, where the court hath not jurisdiction, no agreement or consent of parties to waive that fact will alter the case. *Richardson v. Frank*, *Bar.* 451.

And Monmouthshire, and not Shropshire, is the next English county to South Wales. And where the *venire* issued out of Shropshire, the judgment was arrested. *Goodright, d. Richards v. Williams*, *2 M. & S.* 270.

A defendant who lets judgment go by default upon any declaration intrinsically bad, must be careful not to make defence on the execution of the writ of enquiry; he would thereby waive the right of moving in arrest of judgment. *Freeland v. Hunt*, *2 Wils.* 380. See the *Practical Directions*.

Where trespass is brought against two, one lets judgment go by default, the other is acquitted, and damages are assessed against the defaulter, the judgment will be arrested. *Biggs v. Benger*, *2 Ld. Raym.* 1372.

As to costs.

So, where damages for trespass were severed. *Onslow v. Orchard*, *1 Str.* 422.

But where a defendant shall not take advantage of his own misleading, see *Harvey v. Richards*, *1 H. Bl.* 644.

In case of arrest of judgment each party pays his own costs. *Cameron v. Reynolds*, *1 Cowp.* 403. *Holloway, q. t. v. Bennet*, *3 T. R.* 448.

Statutes of limitations as to arrest of judgment.
21 Jac. I. c. 16.

By stat. 21 Jac. I. c. 16. "If [in certain actions therein mentioned,] a verdict pass for the plaintiff and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action within a year after such judgment reversed or given against such plaintiff."

PRACTICAL DIRECTIONS. K. B.

The first step to be taken is to give brief to counsel indorsed in the cause "to move in arrest of judgment;" fee one guinea, or if the grounds be very special, more. Notice of the motion unnecessary. The clerk of the rules draws up the rule, the purport of which is, that the entry of the final judgment be stayed until the court be moved on behalf of the plaintiff, and it shall otherwise order.

Serve copy on the plaintiff's attorney or agent.

Notice of the time when it is intended to move to discharge the above mentioned rule is given, and on that day an affidavit of the service of such notice is ready.

Both sides then instruct counsel. Amount of fees varies with the nature of the case.

The matter is then argued, and the party's attorney, if the judgment be not arrested, draws up the rule for the discharge of the former rule; serves copy thereof, and proceeds to tax the costs in the usual way.

If the judgment shall be arrested, the opposite attorney draws up the rule, serves copy thereof, and each party pays his own costs.

Where plaintiff may bring a fresh action. See stat. 21 Jac. I. c. 16. above cited.

Whether postea or inquisition need be in court, is not settled. Imp. K. B. negatives either being the practice: but Sel. 497, says, "a rule must be obtained to bring the postea or inquisition into court, which

must be marked by the clerk of the papers in K. B. and by the secondary C. P.; and further, that rule is obtained from the clerk of the rules K. B. or secondary C. P."

Or if the inquisition be still in the hands of the sheriff, notice to him to produce it must be given, and an affidavit of the service of such notice must be made.

Tidd says, "the better way is to give a rule on the *postea* for bringing it into court, and that is notice of itself." If this be the course of proceeding, the above directions will be sufficiently explicit.

PRACTICAL DIRECTIONS. C. P.

The same, *mutatis mutandis*, except that as in this court the appearance day of the *habeas corpora juratorum* may fall on the last day of term, notice of motion must be given, and an affidavit of the service produced. The notice merely states the day the court will be moved that the judgment obtained in the cause may be arrested. Pay the associate for taking the record in court 6s. 8d., treasury keeper 1s. secondary 1s., cryer 6d., give brief to serjeant, indorsed "To move that the entry of the final judgment be stayed until the court shall otherwise order." Fee as above K. B.

In the evening draw up the rule; pay 6s. 6d.; serve copy thereof on plaintiff's attorney.

See PRACTICAL DIRECTIONS, K. B.

FORM.

[Court.]

[Title cause.]

Take notice that this honourable court will be moved on _____ next, or so soon after as counsel can be heard, that the rule made in this cause the _____ day of _____ last, may be discharged. Form of notice to discharge rule for arrest of judgment.

Dated this _____ day of _____.

Yours, &c.

_____, plaintiff's attorney.

To Mr. _____, defendant's attorney.

ASSAULT, *Action for; or Trespass vi et Armis.*

This action lies for an immediate wrong to the person, accompanied with force; it lies for menaces, assault, battery, wounding, mayhem, and false imprisonment. Where it lies.

If, in the action of assault and battery, less than 40s. damage be recovered on verdict, and the judge do not certify, the plaintiff is entitled to no more costs than damages, though the defendant justify the assault only. Page v. Creed, 3 T. R. 391; but if he justify a battery, the plaintiff recovers his full costs, though the damages be under 40s. Smith v. Edge, 6 Id. 562. As to the costs.

See tit. LIMITATION OF ACTIONS, TABLE OF, &c. *post*.

ASSIGNEE, *see Affidavit by ASSIGNEE.* Also tit. BANKRUPT, *post*, and the next Head.

_____ of Insolvent Debtor under the Lords' Act.

Previously to reading the following title, it may be expedient to advert to the first part of the 13th section of stat. 32 G. II. c. 28. the substance of which will be found under the head ALLOW- Stat. 32 G. 2. c. 28. part of s. 13.

ANCE TO A PRISONER, *ante*.
The act, viz. sec. 13, proceeds, And the creditor to whom such assignment shall be made, may thereupon take possession and sue

in like manner as assignees of commissioners of bankrupts, and no release of the prisoner, his executors, &c. subsequent to such assignment, may be pleaded in bar of any such action or suit, which shall be commenced by any such assignee or assignees of any such prisoner; and upon the execution of such assignment, &c. the prisoner to be discharged; and the assignee shall, with all convenient speed, sell and dispose of the estates and effects of every such prisoner which shall be so assigned and conveyed, and shall divide the nett produce amongst the creditors of such prisoner, if more than one, who shall have charged such prisoner in execution before the time of such prisoner's petition to be discharged shall have been presented, rateably and in proportion to their respective debts.

Sections 16 & 17.

The sections, viz. 16 & 17, of this statute, under which the prisoner is compellable to exhibit a schedule of his estate and effects, and under which he is to convey the same by a short indorsement on the back of his schedule, will be found fully abstracted under the head *INSOLVENT DEBTOR*, *post*, which see.

Sect. 21.

By section 21, the assignee is empowered to make any composition with the debtor's accountants to such prisoner, in full for such debt or account, and to submit disputes relating to the prisoner's estate or effects, or in respect of any debt due to him, to the final end and determination of arbitrators to be chosen by the assignee and the party with whom the difference shall be. If arbitrators cannot agree, then to submit the same to an umpire to be chosen by them, or otherwise as assignee shall think fit and can agree; the same to be binding as well on the creditors of the prisoner who shall have charged him in execution, as also on him, and the assignee for what he shall do fairly in the premises is indemnified.

Sect. 22.

By section 22, on complaint to the courts at Westminster, of any insufficiency, fraud, mismanagement, or other misbehaviour of the assignee, by petition of any creditor or of the prisoner to any such court, or to any judge thereof, the parties shall be ordered to attend the court thereon, and the court, or any judge thereof, is to make such order therein for the removal of such assignee, and appointing any new assignee in the place of him removed, or for the prudent, just, or equitable management or distribution of the estate, &c. of such prisoner; and the estate, &c. of the prisoner shall be thenceforth divested out of the assignee removed, and be vested in, and delivered over to the new assignee, &c.

Sect. 23.

By section 23, where mutual credit hath been given between the prisoner and any other person, &c. the assignee is authorized to state and allow the account between them, and demand the balance; and only such balance is vested in the assignee.

Observations.

The compulsory power given by the above act has not, I believe, been often exerted, yet some intimation of its existence was thought necessary in this place, and more fully hereafter; and whether the proceedings be at the instance of the debtor, who may compel the creditor to accept an assignment in satisfaction of the debt; or at the instance of the creditor, who by the clauses above abstracted, is enabled to compel the debtor

to make such assignment, the proceedings seem to be very much alike in both cases. See tit. *INSOLVENT DEBTOR*, *post*. The compulsory clauses in the *Lords' Act*, or act of the 32 G. II. c. 28. s. 16 & 17, *post*.

ASSIGNMENT. See tit. *NEW ASSIGNMENT*, *post*.

————— OF ERROR. See tit. *ERROR*, *post*.

ASSISE OR ASSISES. The term is applied to the court, place, What. or time when and where the writs or processes of assise are handled or taken.

The assise may be general; as where the justices go their several circuits with commissions to take all assises: or special, where a special commission is granted to certain persons (formerly oftentimes done) for taking an assise upon one or two disseisins only.

The judges or justices on circuit have five several commissions only, two of which, namely, those of *assise* and *nisi prius*, are practical.

See a very neat summary respecting assize, *Tomlin's Law Dictionary*, tit. *ASSISE*. Also *Bac. Use of the Law*, 13.

ASSISE, *Writ of*. Where a title to lands is to be tried, ejectment or writ of right will lie; and indeed writs of assise are almost obsolete; being superseded by *ejectment*: but ejectment will not lie for a piscary although an assise will. *Cro. Car.* 594. So, in other cases, assise may lie where trespass *vi et armis* will not. 8 *Rep.* 47.

For proceedings in *assise of novel disseisin*, see *Plowd.* 411, 12.

ASSISE OF MORT D'ANCESTOR. This writ lay where a What. man's father, mother, brother, &c. died seised of lands, &c. held in fee, and which, after their death, a stranger abated. *Reg. Orig.* 223.

It must be brought within fifty years, but it is now obsolete, and, like the former writ, superseded by ejectment or by writ of right, except, as stated in the former title, in very peculiar cases.

Damages are recoverable in this action, it being of a mixed nature. 3 *Com.* 187, 8, where it is also observed that these "heads selected from among the venerable monuments of our ancestors, are not so absolutely antiquated as to be out of force, though the whole is certainly out of use." This of course must mean common use, for proceeding by writ of right is not unfrequent. See tit. *WRIT OF RIGHT*, *post*.

ASSISORS. In Scotland, Skene says, are the same with our jurors.*

* A judicial, especially a jurors', oath in rhyme, is curious, if it be not quite practical:—

We shal leil suith say,
And na suith conceal, far nathing we may,
Sa far as we are charg'd upon this Assise,
Be God himself, and be our part of Paradise;
And as we will answeat to God, upon
The dreadful day of Dome.

Who?

ASSOCIATE. The associate is an officer attending the court of *nisi prius*, whether in London, Middlesex, or on circuit; he receives the records, he marks upon the panel the names of the jurors, who appear and are sworn; he reads all exhibits, and takes and records all verdicts; he draws up and enters all orders of *nisi prius*, and returns the *postea*s. 1 *Rich. Pr.* 36. 59.

To this officer, therefore, is application to be made for *postea*s, records, orders of *nisi prius*, &c. in causes determined on the assises, or otherwise at *nisi prius*.

See TABLE OF OFFICERS and OFFICES prefixed.

What.

ASSUMPSIT, Action upon the Case on. An action the law gives the party injured by the breach or non-performance of a contract either express or implied, and legally entered into; which action allows the party damages in proportion to the loss he has sustained by the violation of the contract. 4 *Co.* 92. *Moor.* 667.

In every action upon assumpsit, or upon an undertaking, there ought to be a consideration, promise, (or undertaking) and breach of promise, (or of undertaking). 1 *Leon.* 405.

The third volume of the Commentaries, page 158, *et seq.* contains a sufficiently correct summary of the nature of this action; and perhaps a reference to that work might answer every useful purpose; but some observations, though they shall not be merely *practical*, may not be deemed out of place.

Where assumpsit lies generally.

The breach of an undertaking to build and cover in a house by a limited time, (and for a proper consideration) subjects the person so undertaking to an action on assumpsit; wherein a pecuniary satisfaction for the injury sustained by the delay may be recovered. So, a breach of a promise to pay a debt entitles the creditor to an action on *assumpsit*.

So, assumpsit lies on an Irish judgment since the Union. *Vaughan v. Plunkett*, 3 *Taunt.* 85. n.

So, the non-payment of a promissory note when due, subjects the maker or indorser of such note to the like action on express *assumpsit* to the holder, whether payee or indorsee.

Statute of frauds, 29 Car. 2.

The stat. 29 *Car.* II. c. 3. enacts that no verbal promise shall be sufficient to ground an action upon, 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. Where there is any agreement that is not to be performed within a year from the making thereof.

Observations.

Such contracts are *express*; but assumpsit will also lie upon those contracts which are *implied* by law. 1. Employment of a person implies an *assumpsit*, promise, or undertaking to pay him *quantum meruit*, as much as he deserves. 2. The purchase of goods, where price is not previously to delivery mentioned, implies an *assumpsit* to pay the seller *quantum valebant*, as much as they were worth. 3. The receipt of money, without any consideration on the receiver's part, implies an *assumpsit* duly to account to the person whose money it is, and thus *assumpsit* will lie where money

has been paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage hath been taken of the plaintiff's situation. 4. So, money laid out for, at the request of another, may be recovered on an implied *assumpsit* to repay it. 5. An *assumpsit* to pay a balance on an account stated is implied: so likewise, 6. Every man who undertakes any office, employment, trust, or duty, contracts with, or promises those who employ or entrust him to perform it with integrity, diligence, and skill. If by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case for damages to be assessed by a jury.

The above is the general outline of the principles of the action of *assumpsit*, express and implied, as drawn by a masterly hand, and though Mr. Selwyn (1 *N. P.* 53. 2d. edit.), has acutely and truly remarked upon the learned commentator's strangely omitting to state either as a principle, or in illustration, that a consideration is necessary to ground an action on *assumpsit*, yet it is not easy to imagine a case for such an action that will not fall within the boundaries so clearly and so definitely traced in the Commentaries. And see "*Practical Treatise on Pleading in Assumpsit*," by *Lewes*. Also 1 *Tidd*, "*Cap. Of Actions*."

ATTACHMENT. Is a process from a court of record, awarded by the justices on a bare suggestion, or on their own knowledge. What.

The history, or a detail of the ancient practice respecting attachment, is foreign to this work; but the time of its precise adoption for this purpose is unknown. See 2 *H. Bl.* 434. n. (a).

The *decisions* which appear to govern the present practice in relation to this writ will be here collected, and such practical observations will be subjoined as shall sufficiently direct the practitioner in all common cases. What will be treated of under this head.

The Forms will conclude the title.

Attachments usually issue for contempt of the king's writs; of the rules of court; abuse of its process; deceits tending to impose on the court; and against the officer proper to the court for malfeasance. Where usually issued.

— against Sheriff.

One of the most usual occasions for the issuing the process of attachment is, where the sheriff shall not have returned a writ, or brought in the body pursuant to the general rules. *T.* 5 & 6 *G. II.* *M.* 32 *G.* III. Against sheriff.

By the first of these rules, the attachment in case of default is to issue against the sheriff, without giving a day to shew cause against such attachment; but the plaintiff cannot proceed on the bail bond, and rule the sheriff too. *Lord Brook v. Stone*, 1 *Wils.* 223, unless the bail bond be void. *Ibid.*

Nor after the sheriff had returned *cepi corpus*, and the plaintiff had brought an action for an escape, and recovered the debt, can the sheriff be ruled to bring in the body. *Borwick v. Walton*, 2 *B. & A.* 626. But if bail be put in with the filazer of the county in which the defendant is arrested on a *testatum capias*, the bail may be treated as a nullity, and an attachment issue. *Clempson*

ATTACHMENT *against Sheriff*; CASES.

How obtained.
Upon whose affidavit.

v. Knox, 2 B. & P. 516. *Aliter* if the county whence the *testatum* issued, appear in the margin of the bail piece. *The King v. The Sheriff of Middlesex*, 3 M. & S. 532.

An attachment is obtained by motion, grounded upon the affidavit of a search having been made at the *custos breviarum* for the return of the writ, or that bail is not put in and justified, and of the due service of a copy of the rule to return the writ, or to bring in the body, as the case may be, and that at the time of service, the original rule was shewn. *Barnard, one, &c. v. Berger*, 1 N. R. 122.

But where the sheriff on being ordered to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody, the plaintiff should have proceeded as if the sheriff had returned *cepi corpus*; and the court set aside an attachment issued against the sheriff for not returning the writ. *The King v. The Sheriff of Kent*, 1 Marsh. 289. See tit. BAIL *above, post*.

How to be entitled.

For the proper entitling of the affidavit, it may be well to repeat here (See tit. AFFIDAVIT, *ante*) that *until it be granted*, the proceedings are on the civil side of the court; but *after it shall have been granted*, the proceedings are on the crown side. *Wood v. Webb*, 3 T. R. 233.

And it must be entitled in the names of all the parties in the suit. *Ethrington v. Kemp*, 1 Chit. R. 727.

It may be moved for the last day of term. *Burr*. 651. and is absolute in the first instance. R. G. T. 17 G. III. And when the rule to bring in the body expires on the last day of term, at the rising of the court on that day. *The King v. The Sheriff of Surrey*, 1 Chit. R. 356.

When returnable.

It is laid down that the attachment must be made returnable on a general return day, though the original process were on a day certain. *The King v. Wilkins*, 1 Str. 624. but the practice is said to be otherwise.

How directed.

If the attachment be granted against the present sheriff, it must be directed to the coroner; if against the late, to his successor. If one sheriff die where two have been ruled, the attachment will be granted against the survivor. *Tidd*, 334. who cites *Willie v. Benwell*, T. 25 G. III. K. B.

When rules obeyed in the country.

When in town.

Six days after service of the respective rules are allowed to return the writ, or bring in the body in a country cause. Four days only are allowed in a town cause. A rule to return a writ must not be issued in vacation, though tested in term time, and attachment granted for not obeying it will be set aside. *The King v. The Sheriff of Cornwall*, 1 T. R. 552. But where a rule to return a writ issued out of the court of C. P. expires in vacation, the sheriff must file it at the return [expiration?] and cannot wait till the ensuing term; the C. P. office being open during the vacation. *The King v. The Sheriff of Middlesex*, 1 Marsh. 270.

And of the four days allowed to perfect bail after exception, the first is reckoned exclusively, and the last inclusively, and *Sunday is no day*. *North v. Evans*, 2 H. Bl. 35. In the above case the exception was entered on the Wednesday, and the attachment was issued on the Monday following; but held that it could not regularly issue till the Tuesday.

But, to set aside an attachment thus irregularly issued, it is necessary that the bail be previously perfected. *North v. Evans*, 2 *H. Bl.* 35.

A rule to bring in the body, tested on the day of the sheriff's return of *cepi corpus*, though issuing afterwards in the vacation, is irregular. *The King v. The Sheriffs of London*, 2 *East*, 241; but in this case the time for putting in bail had not expired, and therefore where it had, it may be held that the sheriff might be ruled to bring in the body on the same day that he returns *cepi corpus*. *The King v. The Sheriff of Middlesex*, 4 *M. & S.* 427. When rules irregularly issued.

An attachment for not bringing in the body will not be set aside with costs, when the render was too late. *Anon.* 1 *Chit. R.* 567, n.; and it is in time if the surrender be made on the day of the expiration of the rule before the issuing the attachment. *Morley v. Cole*, 1 *Price*, 103.

An attachment issued for not obeying a rule to bring in the body, taken out before the day after the expiration of the rule to return the writ is irregular. *Hutchins v. Hird*, 5 *T. R.* 479.

The sheriff has the same time in which to obey these rules as the defendant would have to put in bail. *Maycock v. Solyman*, 1 *N. R.* 139. In this case attachment was set aside without calling on the defendant to justify bail. It is necessary that the proceedings against the sheriff should keep pace with the times allowed for putting in and perfecting bail. And, therefore, where the rule to bring in the body was served on the last day of a term, K. B. held that the bail have the whole of the first day of the next term to justify. Surrender being made on any part of that day in discharge of bail, sheriff cannot be attached. *The King v. The Sheriff of Middlesex*, 8 *T. R.* 446. The rules to keep pace with the time for putting in bail.

There must be exception to bail put in which did not justify in time, before the sheriff can be attached. *Loft*, 159, whether original or added. *The King v. The Sheriff of Middlesex*, 8 *T. R.* And though formal and written exception may be waived, as between party and party, yet before attachment may issue against sheriff, such written notice of exception must have been given to make the sheriff liable to an attachment for not bringing in the body. *Rogers v. Mapleback*, 1 *II. Bl.* 106. *Cohn v. Davis*, 1*b.* 80. Where exception necessary before attachment.

If a defendant sued by a wrong name appear and perfect his bail by his right name, without identifying himself as the person sued by the other name, the plaintiff may treat the bail as a nullity, and attach the sheriff. *The King v. The Sheriff of Suffolk*, 4 *Taunt.* 818. Yet, he may at his option waive the variation of the defendant's name. *Id. ib.*

If the rule for the allowance of the bail be not served, he is still liable to attachment. *The King v. The Sheriff of Middlesex*, 4 *T. R.* 493. Rule for allowance of bail must be served.

If the sheriff be in contempt before the death of the defendant still the attachment shall issue. *The King v. The Sheriff of Middlesex*, 3 *Id.* 133. Where sheriff in contempt through defendant's death.

The sheriff's contempt is not purged by a surrender on a subsequent day, though an attachment be not moved for. *The King v. the late Sheriff of Middlesex*, 8 *T. R.* 30. In *Taylor v. Odium*; but this case seems shaken by a subsequent determination, where Where contempt not purged. K. B.

it was held that an attachment against the sheriff for not bringing in the body after the defendant has surrendered is irregular, though the surrender be not made until after the rule for bringing in the body has expired. *Id.* In *Henderson v. Van Wrede*, 2 M. & S. 562, yet where a defendant was rendered after the time for putting in bail had expired, but within the further time allowed him for that purpose by the court; it was held, that an attachment issued after notice of such render was regular, and could not be set aside without an affidavit of merits, especially as no bail bond had been taken. *The King v. The Sheriffs of London*, 1 Chit. R. 567.

C. P.

But in *Thorold v. Fisher*, 1 H. Bl. 9. it was decided, that "though the rule for bringing in the body had expired, yet if the defendant justify his bail before the plaintiff move for an attachment, the sheriff will not be liable to the attachment.

On this point, therefore, the practice of the two courts seems to be decidedly different.

When motion for attachment made.

When the rule to bring in the body expires on the last day of the term plaintiff may, at the rising of the court on that day, move for an attachment, which may be accordingly issued on the following day, provided bail shall not then be perfected, or the defendant surrendered. R. G. C. P. T. 38 G. III. 1 B. & P. 312. *The King v. The Sheriff of Surrey*, cited 1 Chit. R. 356. n. *The King v. The Sheriff of Berkshire*, 5 East, 386. 11 *Id.* 594. acc. So where two days time is given, and the bail fail to justify, an attachment may issue on the last day. *Thompson's bail*, 1 Chit. R. 356.

And if ruled on the last day of term, but goes out of office before the next term, he is liable to the attachment for not bringing in the body. *Meekins v. Smith*, 1 H. Bl. 629. R. G. T. 31 G. III. but if not ruled within six months after the expiration of his office, he cannot be attached. *The King v. Jones*, 2 T. R. 1.

Where a rule to return a writ is served only three days before the end of a term, the sheriff has all the first day of the next term to file the return. *The King v. The Sheriff of Bucks*, 5 East, 386.

The sheriff must be called upon in a reasonable time.

Sheriff must be ruled in a reasonable time.

A due return having been made to a rule to return a writ in Hilary, an attachment obtained in *Michaelmas* Term following for not bringing in the body was set aside; the court holding such delay unreasonable when both bail and defendant were become insolvent. *The King v. The Sheriff of Surrey*, 7 T. R. 452.

As this was a case, by the court said to be without precedent, it may seem that the particular circumstances might influence the decision.

So, in C. P. where rule for attachment was obtained 19th November, and the attachment not sued out and served on the sheriff till the 9th March following, the attachment was set aside. *The King v. Perring*, 3 B. & P. 151. S. P. *The King v. The Sheriffs of London*, 1 Taunt. 111.

The sheriff waives irregularity in the issuing an attachment by delay. *Rolfe v. Steele*, 2 H. Bl. 276.

In order to surrender a defendant, the bail put in by the sheriff need not justify, and therefore an attachment obtained against him

Sheriff may waive irregularity. Bail put in by sheriff, to surrender, need not justify.

was, on argument where this was the question, set aside. *The King v. The Sheriff of Middlesex*, 7 *T. R.* 528.

And attachment obtained after surrender by bail, who had been rejected, set aside as irregular. 1 *Chit. R.* 446.

So attachment obtained after summons to attend before a judge, for payment of debt and costs, the plaintiff's attorney not having attended at the time, was held irregular. *The King v. The Sheriff of Middlesex*, in the case of *Woodward v. Feltham*, 5 *B. & A.* 747.

By the indulgence of the court an attachment may be set aside, on payment of costs, where bail is put in and no trial lost. *Hill v. Bolt*, 4 *T. R.* 352. *Gravet v. Williams*, *ib. n.* *Callan v. Tye*, 2 *H. Bl.* 235. And where no trial lost, the court will impose no other terms than payment of costs. *The King v. The Sheriff of Sussex*, cited 1 *Chit. R.* 35. *n.* *Adams v. Thompson*, *Id. ib.* and the sheriff shall otherwise appear to have done his duty, as in taking a bail bond. *The King v. The Sheriffs of London*, *Id.* 68. but the application must appear by affidavit, to be *bonâ fide* made by the sheriff. See also, *The King v. The Sheriff of Middlesex*, 3 *M. & S.* 299. See also, *Anon.* 1 *Chit. R.* 567. but where it appears that he has discharged the defendant out of custody, without the plaintiff's consent, upon his own undertaking to appear and put in bail, instead of taking a bail bond, the court will not relieve the sheriff, either by setting aside the attachment, or by staying proceedings in an action for an escape. *S. C. and Fuller v. Prest*, 7 *T. R.* 109. If the application be made by the defendant, an affidavit of merits will be requisite. *The King v. The Sheriff of Surrey*, *Id.* 239.

When and upon what terms attachment will be set aside.

No such affidavit necessary, where bail or sheriff make the application. *Hardisty v. Storer*, 1 *N. R.* 123.

It is ordered, That from and after the last day of this present term (*M. 59 G. III.*) no rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail bond, unless the application for such rule shall (if made on the part of the original defendant) be grounded on an affidavit of merits, or (if made on the part of the sheriff or bail, or any officer of the sheriff) be grounded upon an affidavit shewing that such application is really and truly made on the part of the sheriff or bail, or officer of the sheriff (as the case may be) at his or their own expence; and for his or their indemnity only, and without collusion with the original defendant. *R. M. 59 G. III.* 2 *B. & A.* 240.

Affidavit for setting aside a regular attachment against the sheriff, must in terms comply with the above rule.

So, where the application was made on the behalf of bail, for setting aside an attachment, but the affidavit omitted to state that the application was made for their only indemnity, and at their expence, which was refused, time was given. *The King v. The Sheriff of Middlesex*, 1 *Chit. R.* 347.

On motion to set aside an attachment, whereon affidavit of merits is produced, it is not necessary to state on whose behalf the motion is made. *Bell v. Taylor*, *Id.* 572.

ATTACHMENT *against Sheriff*; CASES.

The court will set aside a regular attachment against the sheriff upon payment of costs, on the production of an affidavit of merit by the defendant himself. *The King v. The Sheriff of Middlesex*, 1 *Chit. R.* 722. But see the above case of *Bell v. Taylor*, *Id.* 572.

When attachment must remain as security.

But if trial has been lost the attachment must remain in the office as a security, in case plaintiff obtain a verdict. *Hill v. Bolt*, 4 *T. R.* 352. And the question, whether or not the attachment shall stand as a security, depending upon the fact whether a trial has been lost, it is for the plaintiff, who seeks to qualify the rule, to shew by his affidavit the necessary facts, such as the date of the delivery of the declaration, which may entitle him so to do. *The King v. The Sheriff of Surrey*, 5 *Taunt.* 606. And see *The King v. The Sheriffs of London*, 1 *Chit. R.* 557. *acc.*

But as action by original differs from an action by bill as to the time of obtaining the judgment, the jury process in the former being returnable on a general return day, and therefore where the plaintiff may have lost a trial at the last sitting in term, yet if judgment could not be obtained until next term, he has not lost "a trial" within the technical import of that term. *The King v. The Sheriffs of London*, *Id.*

Where an attachment issued against the sheriff for not taking a bail bond, the court, on motion of the defendant, refused to set aside the attachment on any terms; but, upon an affidavit of merits, they let him in to defend, ordering the attachment to stand as a security. *Turnbull v. Moreton*, *Id.* 721. But see *The King v. The Sheriffs of London*, 2 *B. & A.* 54. where the setting aside attachment for not bringing in the body, was altogether refused, though the defendant swore to merits, no bail bond having been taken.

Terms upon which sheriff released from attachment.

In both courts the sheriff can only be relieved from an attachment for not bringing in the body by paying the whole debt and costs, and not merely the sum sworn to and costs. *Heppel v. King*, 7 *T. R.* 370. *Fowlds v. Mackintosh*, 1 *H. Bl.* 233.

Observations.

See also the cases before and after mentioned, which, however, are only applicable where trial has not been lost, or that there are merits; in this last case, the attachment remains as a security; so for not returning a writ of execution. *The King v. The late Sheriff of Middlesex*, *Id.* 543.

In this case the writ had been returned to the treasury, instead of the *custos brevium*, and this was sworn to have been a mistake; but then there appeared to have been some undue practices on the part of the sheriff.

How attachment may otherwise be avoided or abandoned.

In C. P. the attachment may be avoided, *Weddall v. Beyer*, 1 *B. & P.* 325, or gotten rid of, *Williams v. Waterfield*, *Id.* 344, by justifying bail and paying the costs. See also *Turner v. Bristow*, 2 *B. & P.* 38. *Jarrett v. Creasy*, 3 *Id.* 403. *The King v. The Sheriff of Middlesex*, 1 *Taunt.* 56. or the plaintiff may abandon it, and proceed on the bail bond. *Pople v. Wyatt*, 15 *East*, 215.

Or sheriff discharged.

A cognovit without notice, discharges the sheriff. *The King v. The Sheriff of Surrey*, 1 *Taunt.* 159. so a warrant of attorney to

confess judgment with a defeazance, upon payment by instalments. *Brown v. Reave, Wightw.* 121.

But where at the request of the officer, the plaintiff at first forbears to enforce the attachment, and ten days afterwards demanded debt and costs of sheriff: Held, that he was not discharged by the indulgence given to the officer. *The King v. The Sheriffs of London, 1 Taunt.* 489.

The sheriff may also avoid an attachment by himself putting in and justifying bail. *Wolfe v. Collingwood, 1 Wils.* 232. And it is not necessary that an affidavit should be made of the service of the notice of render in order to complete the render, so as to prevent an attachment against the sheriff; and therefore an attachment issued after notice of render, but before affidavit thereof. *The King v. The Sheriff of Middlesex, 1 Chit. R.* 359.

Nor in order to discharge the sheriff, is it necessary to make an entry of the committing in the marshal's book. And the attachment already issued was set aside with costs. *The King v. The Sheriff of Middlesex, Id.* 59.

Attachment against the sheriff set aside, on the ground that the notice of exception to bail was not entitled on the cause, though the notice was served upon the defendant's attorney at the same time with the declaration. *The King v. The Sheriff of Middlesex, Id.* 741. And see *The King v. The Sheriff of Middlesex, in the case of Woodward v. Feltham, 5 B. & A.* 747.

So where bail above have been put in, though they were put in by a new attorney on behalf of the bail below, without an order for changing the attorney. *The King v. The Sheriffs of London, Id.* 329.

And where the attachment will be set aside, on the ground that the sheriff is a trespasser, see tit. ARREST, *ante*; or *Wilks v. Lorck, 2 Taunt.* 399, and *The King v. The Sheriff of Surrey, 1 Marsh.* 75.

In case of special bailiff being appointed at the plaintiff's instance, sheriff cannot be ruled to return the writ. *Hamilton v. Dalziel, 2 Bl. R.* 952. *De Moranda and Others v. Dunkin and Others, 4 T. R.* 119.

Where sheriff cannot be compelled to return the writ.

PRACTICAL DIRECTIONS. K. B.

On the return day of the writ, previously to moving for an attachment, apply at the clerk of the rules for a rule to return the writ; pay 6s. 6d., 7s. if the writ shall have issued in Durham, Chester, Lancaster, or the Cinque Ports; mention the name of the officer who made the arrest; copy must be served on the deputy secondary (if in London) at his office; or on Mr. Smith, at the office of the sheriff, if in Middlesex; or on the sheriff or under-sheriff, and not on his agent in town, every where else. *The King v. Coles, Doug.* 420, unless such sheriffs shall have agreed or appointed to accept a service in London, *ib.* The original rule must be shewn at the time of service. *The King v. Smithies, 3 T. R.* 351.

At the expiration of the rule, that is, four days in L. and M., six days elsewhere, search for the return of the writ, of the term the same is returnable, at the *custos brevium* at the Treasury Chamber, Westminster

ATTACHMENT against Sheriff; PR. DI. K. B.; FORMS.

Hall, who, agreeably to R. T. 30 G. III. 3 T. R. 787, marks on the writ the day and hour of its being filed.

If the return be not filed, make the affidavit No. 1. FORMS, K. B. (which affidavit is indispensable, Harmer v. Tilt, 2 Marsh. R. 251.) and move for attachment as directed on rule, to bring in the body, mentioned below. But if the writ be lost, and cannot therefore be returned, the plaintiff, agreeably to The King v. The Sheriff of Kent, 1 Marsh. R. 289, should proceed as if the sheriff had returned cepi corpus.

If the return cepi corpus be filed, apply at the clerk of the rules, as before, for rule to bring in the body; observe that the time both for the return of the writ and for putting in bail above must have expired. See before; pay 6s. 6d. or 7s. as the case may be. The directions for the service of a copy of this rule are the same as those immediately before stated in relation to the service of the copy of the rule to return the writ.

If the bail shall not have justified, or the defendant not surrendered in due time, and the rule be expired, make affidavit of the service agreeably to No. 2. See FORMS, K. B. post.

Indorse on the Affidavit No. 3. See FORMS, K. B. post.

In the evening get the rule for the attachment at the clerk of the rules, pay _____

Carry same to your clerk in court at the Crown Office, Inner Temple, who makes out attachments, pay him 18s. 6d.; then make out bill of costs; add coroner's fee of 2l. 2s. and 2s. 6d. for the warrant, and take same to the coroner's, who will grant warrant thereon.

For coroners and their offices, see TABLE OF OFFICES prefixed.

If the money remain unpaid, and the coroner neglect to do his duty, apply at the Crown office for a rule to return the attachment; serve copy on him in like manner, shewing original as before directed, in relation to the sheriff; move the court in like manner for attachment against the coroner, to be directed to two elisors; these are named by the master of the Crown Office.

FORMS. K. B.

[Court.]

[Title Cause.]

No. 1.
Affidavit of service of copy of rule to return writ.

A. B. of _____, clerk to _____, attorney for the plaintiff in this cause, maketh oath and saith, that deponent did, on the _____ day of _____ instant, personally serve _____, who is, or acts as deputy sheriff of the county of _____, with a true copy of the rule hereunto annexed, and at the same time shewed him the said original rule: And this deponent further saith that he did, this morning, search with the *custos brevium* of this honourable court, for the return of the writ issued in this cause, but the same was not then filed with him.

Signed, &c.

If latitat.

If it be a writ of *latitat*, then say, "for the return of the writ of *latitat* issued in this cause, but no such writ was then filed there."

If served on secondary.

Maketh oath and saith that he did, on the _____ day of _____ instant, personally serve _____, who acts as deputy secondary of the Compters of the city of London, with a true copy of the rule hereunto annexed, and at, &c.

If on his deputy.

If the rule were served on his deputy, say, "that he did, on the _____ day of _____, serve _____, who acts as deputy-secondary of the Compters of the city of London, with a true copy of the rule hereunto annexed, &c."

A. B. of, &c. clerk to ———, attorney for the plaintiff in this cause, maketh oath and saith that he did, on the ——— day of ——— instant, personally serve Mr. ——— with a true copy of the rule hereunto annexed, and which said Mr. ——— is or acts as the deputy-secondary of the Compters of the city of London, and at the same time shewed him the said original rule: And this deponent further saith, that no bail has been put in above for the said defendant in this cause.

No. 2.
Affidavit of service of copy of rule to bring in the body.

If the rule be served on a clerk in the office, say, "that he did, on the ——— day of ——— instant, serve Mr. ———, who acts as deputy-secondary of the Compters, (or if in Middlesex, "who acts as deputy sheriff of the county of Middlesex,") with a true copy of the rule hereunto annexed, by delivering a true copy of the said rule to *A. B.* a clerk in the office of the said deputy-secondary (or sheriff,) situate in ———, in the city of London, and at the same time showing him the said original rule (or) by delivering a copy of the said rule to *A. B.* a clerk in the said office of the said deputy-secondary, and at the same time shewed to him the said original rule.

If served on a clerk in the office.

Maketh oath and saith that he did, on the ——— day of ——— instant, personally serve Mr. ———, who is the under-sheriff of the county of ———, with a true copy, &c.

If on the under-sheriff in country.

To move for attachment against the sheriff of ———, for not returning the writ or bringing in the body (as the case may be) pursuant to the rule annexed.

No. 3.
Indorsement.

PRACTICAL DIRECTIONS. C. P.

The first day of the term, or 4to die post of any other return, get rule to return writ from the secondary; pay ———.

Serve copy as directed before in P. D. K. B.

This rule expires in four days next after service thereof, where the cause is in London or Middlesex: other counties in six days.

Search for return at the custos brevium, Brick Court, Temple.

If not returned, make affidavit No. 1. FORMS, C. P.

Indorse No. 3. FORMS, C. P. on the affidavit; give same to serjeant, 1s. 6d.; and in the evening apply for the rule for the attachment as hereafter directed respecting rule to bring in the body.

*If the return *copi corpus* shall be filed, and bail hath been put in in due time, enter exception against the bail, and give notice; this is necessary; then get an extract of the writ and return from the custos brevium, pay 4d.; take same to the filazer for the county, who gives you a rule for the sheriff to bring in the body, pay 2s. 11d.; on producing which, the secondary grants a rule peremptory for the sheriff to bring in the body, pay ———; serve copy as before, and shew the original.*

If bail do not justify on or before the expiration of the rule, or surrender shall not have been duly made, swear affidavit of service of rule, No. 2. FORMS, C. P.

Indorse thereon No. 3. FORMS, C. P.

Give same to serjeant, 10s. 6d. The secondary draws up the rule for the attachment, which in this court is drawn out by the attorney.

See No. 4. FORMS, C. P.

Write the title of the cause, and the words of the rule, at the foot of the attachment, viz. "for not bringing in the body of the defendant," or as the case may be.

ATTACHMENT *against Sheriff*; FORMS. C. P.

Take it to the prothonotary's, pay signing 1s. 4d., seal 7d.; then carry same, with the bill of costs, to the coroner for the county, (See TABLE OF OFFICES), pay him two guineas; warrant 2s. 6d.

The attachment should be directed, if against the present sheriff, to the coroner; if against the late sheriff, to his successor.

On the return of writ of attachment, apply to the coroner; if he do not pay the money, he may be compelled to return the attachment by steps similar to those taken against the sheriff; the secondary makes out the rule for this purpose; serve copy on the coroner, make affidavit of service, and give brief to serjeant to move for attachment against coroner; as directed in relation to the former proceedings against the sheriff. The forms of the affidavits, &c. are nearly the same mutatis mutandis.

The attachment against the coroner is granted in the first instance. *Andrews v. Sharp*, 2 Bl. Rep. 911. *The King v. Peckham and Clark*, *ibid.* 1218.

FORMS. C. P.

No. 1.
Affidavit of service of copy of rule to return writ.

A. B. clerk to Mr. C. D. attorney for the above named plaintiff, maketh oath and saith, that a writ of *capias ad respondendum* was regularly issued out of and under the seal of this honourable court, returnable _____ last past, directed to _____, and that this deponent did, on the _____ day of _____ instant, serve Mr. _____, who is or acts as _____ at _____ office in _____ with a true copy of the rule hereto annexed, and at the same time shewed him the said original rule: And this deponent further saith, that he did this morning search with the *custos brevium* of this court amongst the file of writs as of this term, for the return of the said writ of *capias ad respondendum*, but that the same was not filed with the said *custos brevium*.

No. 2.
Affidavit of service of copy of rule to bring in the body.

A. B. clerk to C. D. of _____ attorney for the plaintiff in this cause, maketh oath and saith that he did, on the _____ day of _____ instant, personally serve Mr. _____, who is, or acts as _____, with a true copy of the rule hereto annexed, at the same time shewing the said Mr. _____ the said original rule: And this deponent further saith, that bail above has been put in for the said defendant in this cause, but the same is not perfected.

No. 3.
Indorsement on motion, &c.

To move for an attachment against the sheriff for not bringing in the body pursuant to the rule annexed.

No. 4.
Form of attachment—stamp 5s.

George the Fourth. To the coroner of our county of _____, greeting. We command you, that you attach A. B. esq. sheriff of our said county, so that you may have him before our justices at Westminster, on _____, to answer us of and concerning those things which on our part shall at that time be objected against him; and that you have then there this writ. Witness _____ at Westminster, the _____ day of _____ in the _____ year of our reign.

[If in Middlesex, say—To the coroners of our county of Middlesex, greeting.]

No. 5.
Indorsement.

To move for an attachment against the coroner for the county of _____, for not returning the writ of attachment against _____, the sheriff of the said county _____, to be directed to elisors, to be approved by the prothonotary.

ATTACHMENT, *against the late Sheriff.*

Time for ruling late sheriff.

By the 20 G. II. c. 37. s. 2. "no sheriff shall be liable to be called upon to make a return of any writ or process, unless he be

required so to do within six months after the expiration of his said office."

The proceedings against the *late* sheriff are the same as those before detailed in relation to the *present* sheriff in both courts. Proceedings, where the same.

Formerly, if the sheriffs did not bring in the body, K. B. proceeded by *distringas*; but that practice is superseded by R. G. T. 31 G. III. which orders, that where any sheriff, before his going out of office, shall arrest any defendant, and *cepi corpus* shall be returned, he shall and may, within the time allowed by law, (six months by stat. 20 G. II. c. 37. s. 2. as above-mentioned) be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted. See 1 Sel. 208. Former proceeding.

In proceedings against the *late* sheriff, care must be taken that they be made to relate to the *late* sheriff, and the copies of the rules, &c. must be served on the *late* sheriff, or his under-sheriff. Precautions in proceeding against late sheriff.

The business of the sheriffs of London and Middlesex being executed at known public offices, such service there will be good. The six months mentioned in the above act, are lunar, or six times twenty-eight days. The King v. Adderly, *Doug.* 463; and the day on which the sheriff quits office is to be reckoned as one. The six months lunar.

The only way to call on a sheriff to return a writ is by a rule and process of the court, and therefore the *late* sheriff is not liable to an attachment for not returning a writ, if not called upon *by rule of court* within six months after the expiration of his office, although previously *requested* so to do. The King v. Jones, 2 T. R. 1. Rule indispensable. Request insufficient.

ATTACHMENT *against a Bailiff of a Liberty.*

Whatever hath been said above, respecting attachment against sheriff, is applicable to the case of a bailiff of a liberty neglecting to obey the writs, rules, mandates, or orders issuing out of the superior courts, especially directed to him. Boothman v. The Earl of Surrey, 2 T. R. 5.

— *of Privilege.* See tit. ATTORNEY, PROCEEDINGS BY, *post*.

— *on Interrogatories.* See tit. INTERROGATORIES, *post*.

— *against a Witness.*

This writ may be moved for against a witness upon an affidavit of his having been duly served with a *subpœna*; of the expences having been tendered to him, and of his having refused to appear and give evidence pursuant to the *subpœna*.

The reasonable expences must be tendered at the time of the service of the *subpœna*, and in this case, namely, in E. T. 14 G. II. it was said by the court that this way of punishing, as for a contempt, was new, and to that day not done in C. P. Chapman v. Pointon, *Str.* 1150. And see — v. St. Leger, H. 37 G. III. K. B. 1 *Tidd*, 836. And it must be served a reasonable time before trial. Hammond v. Stewart, *Str.* 510.

It is now, however, an established practice in both courts; though the facts upon which the writ will be granted must be well made out as to due service, *Holme v. Smith*, 1 *Marsh.* 410; and "tender of expences, according to the witnesses countenance or calling, and as having a regard to the distance of the places." Stat. 5 *Eliz. c. 9. s. 12*, of which the above clause as to the tender, &c. is a part, gives a remedy against a witness for not obeying a *subpœna*, and the court will require the same evidence in support of the motion for an attachment, as would be necessary to be offered under the statute. *Bowles v. Johnson*, 1 *Bl. R.* 36. See also *Fuller v. Prentice*, 1 *H. Bl.* 49, which establishes the point that before an attachment can be granted, a witness must be tendered the whole of his necessary expences at the time of the service of the *subpœna*, viz. those going to the place of trial, those whilst there, and those on returning home. And where the witness resided twenty-four miles from the assize-town, and his expences were not tendered to him till the evening before the trial, the court would not grant an attachment. *Holme v. Smith*, 1 *Marsh.* 410. And where the witness Dearn, from no ill motive, nor from negligence or inattention, absents himself, it is not a contempt for which an attachment will be granted. *Blandford v. De Tastet*, 5 *Taunt.* 260. See also same case as to the witness Vartoris, 1 *Marsh. R.* 42.

See tit. SUBPŒNA, *post*.

ATTACHMENT against Peers. See tit. PEERS, PROCEEDINGS AGAINST, *post*.

————— for Non-performance of an Award. See titles ARBITRATION, *ante*; REFERENCE AT NISI PRIUS, *post*.

————— for Non-Payment of Costs on Allocatur. And see titles ARREST, in the Table, *ante*; and ATTORNEY, *post*.

The proceeding by attachment for non-payment of costs is similar to every proceeding by attachment for contempt, and must in this case, as well as in all others, be founded upon an affidavit correctly stating the requisite facts. See the FORM, No. 1. subjoined.

And service of the order *nisi* for costs on the clerk in court, and service of the *allocatur*, and demand and refusal of the costs, held sufficient to ground attachment for contempt. *Merrit v. Meck*, 3 *Anstr.* 656.

The rule for an attachment for non-payment of costs, on the master's *allocatur*, is absolute in the first instance. *Chaunt v. Smart*, 1 *B. & P.* 477. And this although some years have elapsed since the taxation. *The King v. C. D.* 1 *Chit. R.* 723. Per Buller, J. *M.* 24 *G. III.* K.B. 2 *Tidd*, 1005. And attachment may be moved for the last day of term. — *v. —*, 5 *Burr.* 2680. And where the matter has been referred to the master, the court, on shewing cause against an attachment, will not go into the accounts; the *allocatur* being in the nature of a judgment, and the attachment like a writ of execution; and besides, the party on going before the master, enters into an undertaking to pay such sum as he shall find to be due. Per Cur. *M.* 45 *G. III.* K. B. 1 *Tidd*, 493. And see *King v. Price*, 1 *Price*, 341.

The order made on motion to pay money into court, that the defendant shall pay the costs is imperative in that respect in the Court of Exchequer; and if not paid when taxed, he is liable to attachment, which process is final, and being in the nature of an execution, not bailable. But the plaintiff may proceed to trial if the costs are unpaid, and this is stated to be his only course in *K. B. Plummer v. Savage*, 6 *Price*, 126.

And attachment for costs due from the plaintiff to his attorney lies, although the attorney be disqualified, the plaintiff having received the whole of the debt and costs from the defendant. *Diamond v. Clarke*, 1 *Chit. R.* 222. And the demand cannot be made by the attorney's clerk, without a power of attorney. *Hartley v. Barlow*, *ib.* 229.

Nor on a Sunday. *M'Illeham v. Smith*, 8 *T. R.* 86. But *personal service* is indispensable. *Broderick v. Teed*, 1 *Price*, 401. *Anon.* 2 *Id.* 41. And see *Pope v. Smith*, *K. B.* 2 *Tidd*, 1005; also *Hubbard v. Horton*, *H.* 36 *G.* III. *K. B.* *Id.* as to demand being necessary. Even if it be sworn that the tenant keeps out of the way to avoid being served. 1 *Chit. R.* 509.

And if demand be made by other than the party, a power under seal is necessary. *Hartley v. Barlow*, *Id.* 229.

But C. P. will not open a rule for an attachment for non-payment of costs on the mere affidavit of the party that he has not been served, at least unless he shew some mistake in the service. *Hoppley v. Granger*, 1 *N. R.* 256.

Though the plaintiff discontinue on the common rule on payment of costs, he is not liable to an action for non-payment. *Stokes v. Woodeson*, 7 *T. R.* 6.

And where a defendant having been taken under an attachment for non-payment of money, was discharged by the sheriff on his consenting to return into custody, the court, on his refusal so to do, granted an *alias* against him. *Good v. Wilks*, *T.* 57 *G.* III. *K. B.* 2 *Tidd*, 1047. Where second attachment.

A pauper is liable to attachment for non-payment of costs. *Rice v. Brown*, 1 *B. & P.* 39. But a peer is not. Lord Falkland's case, *E.* 36 *G.* III. *K. B.* 1 *Tidd*, 217. And generally the same rules govern caption on money attachments, as on other processes. See tit. ARREST, in the *Table*, ante.

The ten days after a demand of costs, under a recognizance taken by virtue of the statute 5 *W. & M.* c. 11. s. 2, 3. must elapse before an attachment can be granted. *The King v. Ireland*, 3 *T. R.* 512.

PRACTICAL DIRECTIONS. K. B.

The money marked on the allocatur having been duly demanded, and if by a clerk he must be empowered under seal, (Hartley v. Barlow, 1 Chit. R. 229.) give the affidavit No. 1, FORMS, to counsel; 10s. 6d.; indorse No. 2. Vary the affidavit according to the facts.

The clerk of the rules, K. B. draws up the rule; pay 7s. 6d.; carry same to the Crown Office; the clerk in court makes out the attachment; pay 18s. 6d.; the sheriff's officer executes it; his fee, one guinea; warrant 2s. 6d.

ATTACHMENT, &c.; PR. DI. C. P.; FORMS.

If the proceeding for attachment be founded on a judge's order, it must be first made a rule of court. Per Lord Kenyon, Ld. C. J. in Curtes v. Taylor, E. 35 G. III. K. B. 1 Tidd, 532.

PRACTICAL DIRECTIONS. C. P.

Indorse No. 2. on, and give affidavit to serjeant, 10s. 6d.; the secondary draws up the rule. Make out attachment, see FORMS, No. 3: to be returnable on a day certain.

The prothonotary signs it; pay 1s. 4d.; seal, 7d.; warrant, 2s. 4d.; the sheriff's officer executes this attachment.

FORMS.

[Court.]

[Title Cause.]

No. 1.
Form of the affidavit on which to move for an attachment for non-payment of costs.

A. B. of, &c. and C. D. of, &c. the above-mentioned defendants severally, make oath and say, and first this deponent A. B. for himself saith, that he did personally serve the above-named plaintiff with a true copy of the rule and the master's *allocatur* thereon, hereto annexed, and at the same time shewed him the said original rule and master's *allocatur* thereon; and that this deponent then demanded of him the costs allowed by the master on the said rule, but that the above-named plaintiff did not then pay, nor hath he at any time since, paid the same to this deponent, and the same now remains unpaid to this deponent: And this deponent C. D. for himself saith, that he hath not received the said costs, or any part thereof, but the same now remains due and unpaid to this deponent.

No. 2.
Indorsement.

To move for an attachment for not paying costs agreeably to the master's or prothonotary's *allocatur*.

No. 3.
Attachment for non-payment of costs on *allocatur*.

George, &c. To the sheriff of ———, greeting. Attach A. B. so that you may have his body before ——— on ———; to answer us of and concerning such things as on our behalf shall be then and there objected against him; and have then and there this writ. Witness ———, at Westminster, the ———, in the ——— year of our reign.

Doe v. Roe, for non-payment of ——— costs, taxed by ——— pursuant to a rule of court. Dated ——— day of ——— 18

ATTACHMENT. For not paying money on a composition of penalties under rule of court.

Where a defendant in a penal action obtains a rule to stay proceedings on payment of part of the penalties, the court will grant an attachment against him for non-payment. *Hart, q. t. v. Draper, 2 Marsh. 358. 7 Taunt. 43. King v. Cliftot, 5 T. R. 257.*

ATTACHMENT FOR CONTEMPT.

It will have sufficiently appeared that the motion for an attachment for contempt must be founded upon a clear and correct statement of facts by affidavits.

The court refused to make a rule for an attachment absolute against A. for non-production of indentures according to their order, on his swearing that he could not comply with the order, not having the indentures in his possession; that he had never destroyed them; and that he had made diligent search for them, and repeatedly enquired for them, but could find no trace of them. *Cooke v. Tanswell, 8 Taunt. 131. 2 J. B. Moore, 513. S. C.*

If a plaintiff having sued out a *fiery facias*, the defendant pay the plaintiff's attorney the debt and costs, without the writ being delivered to the sheriff, it was held no contempt to attach the same money in the hands of the plaintiff's attorney, for a debt due from the plaintiff to the defendant. *Gwinness v. Brown*, 4 *Taunt.* 472.

Peers are liable to attachment for contempt in not obeying the forms of the court. See 1 *Tidd*, 217.

It seems that the mere collaring and shaking the officer on serving process, is insufficient to ground attachment for contempt. *Adams v. Hughes*, 1 *Brod. & Bing.* 24. And see *Thyers v. Wells*, 1 *J. B. Moore*, 147.

Yet where upon service the defendant speak contemptuously of the court, attachment will be granted in the first instance. See 1 *Tidd*, 191. But it has been doubted, whether, where one person only deposes to the contemptuous words, the rule for the attachment be absolute or *nisi*. See *Say*, 114. *Adamson v. Gibson*, H. 27 G. III. K. B. 1 *Tidd*, 191 n. And it thence seems that a distinction is taken where the contempt appears on the sheriff's return, and in this case the attachment goes in the first instance; but if on affidavits, the party must have an opportunity for answering.

The sealer of the writs refusing to seal a writ on one of the statutable holidays, *viz.* St. Luke's, held not liable to attachment for contempt. *Martin v. Bold*, 7 *Taunt.* 182.

The court of Exchequer will not grant a messenger to bring up a party who has given bail upon an attachment for contempt. See *Birdwood v. Hart*, 6 *Price*, 32.

An attachment for contempt in not paying money, or a rule *nisi* for attachment, cannot be executed or served on a Sunday, those attachments being in the nature of *civil* executions. *M'Illeham v. Smith*, 8 *T. R.* 86. *The King v. Stokes*, *Cowp.* 136. *Lane v. Myers*, 1 *T. R.* 265. *Bonafous v. Schoole*, 4 *T. R.* 316. And it has been resolved by all the judges contrary to what had been determined before in K. B. 1 *Ld. Raym.* 722. *Rex v. Dawes*, S. C. 2 *Salk.* 608, that the sheriff cannot take bail on an attachment for a contempt, though a judge at his chambers may, 1 *Str.* 479. S. P. *Field v. Workhouse*, *Com. Rep.* 264. And the court of C. P. would not apply forfeited penalties of the recognizances of bail to attachments, in the discharge of the debt of a defendant, in a cause in which those attachments happened to have been incidentally issued. See *The King v. Davey*, 3 *Taunt.* 112.

See titles FOREIGN ATTACHMENT. PRISONER, *post*.

ATTAINER. The corruption of blood immediately consequential of sentence of death. What.

Attainder may be pleaded in abatement. *Bisse v. Harecourt*, *May be pleaded in abatement.* *Carth.* 137, 138. or in bar. *Bro. V. M.* 252.

ATTAINT, *Writ of*. A writ of attaint lieth to enquire whether a jury of twelve men gave a false verdict. *Finch*, 484. now obsolete unless on very strong circumstances, and then if found against the jury, the judgment against them by the common law is severe indeed. As a proof of the abhorrence with which our rightly feeling ancestors viewed a false or corrupt verdict, I shall insert

ATTORNEY AT LAW.

the sentence incurred by those attainted of having given one, viz.

1. That the jurors should lose for ever their *liberum legem*.
2. That they should be for ever infamous and unworthy of belief.
3. Their goods and chattels to be forfeited to the king. 4. Their lands and tenements to be in like manner seized into the king's hands. 5. Their wives and children to be turned out of doors.
6. Their houses, trees, crops, razed and extirpated. 3 *Inst.* 164.

It is superseded, (whether quite as usefully, or not, is another question) by NEW TRIAL, which see.

ATTORNEY AT LAW. *This Head will be treated under the sections following, viz:*

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|---|--|
| I. Abstract of statutes | } relating to attorney at law, arranged chronologically. |
| and | |
| II. Rules and orders | |
| III. Cases, &c. on articles of clerkship and admission. | |
| IV. Practical directions as to articles of clerkship and admission, K. B. | |
| V. Practical directions as to articles of clerkship and admission, C. P. | |
| VI. Forms relating to articles of clerkship and admission. | |
| VII. Cases on delivery and taxation of, and action for, attorney's bill. | |
| VIII. Practical directions as to delivery of attorney's bill. | |
| IX. Practical directions as to proceeding to tax an attorney's bill, K. B. | |
| X. Practical directions as to proceeding to tax an attorney's bill, C. P. | |
| XI. Cases on the lien of the attorney on money recovered, deeds and papers, for his bill. | |
| XII. Cases as to attorney generally; his liabilities, privileges, &c. | |
| XIII. Rules and cases as to proceedings by attorney, <i>plaintiff</i> , generally. | |
| XIV. Practical directions as to proceedings <i>by</i> attorney, <i>plaintiff</i> , K. B. | |
| XV. Forms of proceedings by attorney, <i>plaintiff</i> , K. B. | |
| XVI. Cases in proceedings <i>against</i> attorney, K. B. | |
| XVII. Practical directions as to proceedings <i>against</i> attorney, K. B. | |
| XVIII. Forms of proceedings <i>against</i> attorney, K. B. | |
| XIX. Cases on proceedings <i>by</i> attorney, <i>plaintiff</i> , C. P. | |
| XX. Practical directions as to proceedings <i>by</i> attorney, <i>plaintiff</i> , C. P. | |
| XXI. Forms of proceedings <i>by</i> attorney, <i>plaintiff</i> , C. P. | |
| XXII. Cases in proceedings <i>against</i> attorney, C. P. | |
| XXIII. Practical directions as to proceedings <i>against</i> attorney, C. P. | |
| XXIV. Forms of proceedings <i>against</i> attorney, C. P. | |

Attorney at law is a person who, duly authorized by another, who transacts his legal business.

The person and business, or profession of attorney at law, is recognized by statutes as well as common law. Recognized by statute.

For points as to the history of *Attorney*, see *Gilb. C. P. edit. 1737. Comyn's Digest*, and *Tomlin's Law Dictionary*.

The statutes, rules, and orders of the courts at Westminster, particularly K. B. and C. P. relating to attornies, will be abstracted, and other matters will be treated in the order in which the several sections are numbered.

I. *Abstract of Statutes relating to Attorney at Law, arranged chronologically.*

The first general statute relating to attorney at law, appears to be that of *Westm. 2*, by which it is enacted, that persons may make *general attornies*, &c. for them during the circuit, 13 *Edw. I. st. 1. c. 10.* General attornies during circuit.

By statute 27 *Edw. I. st. 2. sect. 3*, persons dwelling beyond sea, unable to travel, *ib. sec. 5*. by statute 12 *Edw. II. st. 1. c. 1.* tenants in assize may make attornies. Who may make.

Stat. 15 *Edw. II. c. 1*. enables the Lord Chancellor, judges, and barons, to admit attornies in their respective courts, but such power is denied to their clerks and servants. And general attornies in writ of *premunire*, appointed by persons out of the realm with the king's license, may make other attornies under these, 7 *R. II. c. 14.* Who may admit attornies.

Stat. 4 *Hen. IV. c. 18*. enacts, that all attornies shall be examined by the justices, and by their discretions be put on the roll, and they that be good and virtuous and of good fame, shall be sworn truly to serve in their offices, and especially to make no suit in a foreign county; and an attorney being notoriously found in any default, of record or otherwise, &c. shall forswear the court, and never afterwards be received in any court of the king, *ib. and by c. 19*. of the same statute no officer of a lord of a franchise, shall be attorney in any plea within the same. By whom examined.

Stat. 7 *Hen. IV. c. 13*. enacts, that impotent persons that be outlawed by erroneous process may make attornies to reverse such erroneous process. Where punished.

Stat. 1 *Hen. V. c. 4*, enacts, that no undersheriff, sheriff's clerk, receiver, nor sheriff's bailiff, shall be attorney in the king's court while in office. Who shall not be attorney.

By stat. 18 *Hen. VI. c. 9*. an attorney forfeits 40s. for not entering his warrant in or before the same term exigent is awarded. Who may make.

The next statute to be noticed, viz. stat. 33 *Hen. VI. c. 7*. veils in the obscurity of a learned language an allusion to evils then existing, but now happily nearly extinguished: The statute, after reciting that many attornies in the counties and city mentioned, had no other means of living, than by advising and procuring, moving and exciting the people to prosecute suits, originating more in evil mindedness and in malice than in the truth, restrains the number of *common attornies* in Norfolk and Suffolk, to six in each county, and two in Norwich. *N. B.* It has been doubted Where forfeit.

Who may make
attornies.

When warrant
to be entered.

Where attorney
pleads a forged
deed.

Who may appear
by attorney.

Where fee, &c. to
counsel allowed.

Where must de-
liver a bill signed.

Penalty on delay-
ing suits, &c.

Where oath to be
taken to govern-
ment.

Persons convict-
ed of what crimes
practising may be
transported.

The four first
temporary
clauses.

After 1st Decem-
ber, 1730, where
none to act as an
attorney.

Examination, by
whom.

whether this statute be obsolete. *Pick. Stat.* vol. iii. 333. *Rast. Ent.* 29. c.

Stat. 3 *Hen.* VII. c. 1. enables appellants, where bataille lies not, to make their attornies, and the 23 *Hen.* VIII. c. 3. s. 8. enables a petit juror to make his attorney in attain.

An attorney must enter his warrant in court the same term when the issue is entered to avoid error, on pain of 10*l.* and imprisonment, in the discretion of the judge. 32 *Hen.* VIII. c. 30. s. 2. 2 & 3 *Edw.* VI. c. 32. 18 *Eliz.* c. 14. sect. 3. 21 *Jac.* I. c. 13.

Attornies pleading a forged deed, &c. for their client, not being privy to the forging the same, not punishable. 5 *Eliz.* c. 14. s. 15.

Defendants, in suits on penal statutes being bailable, may appear by attorney. 29 *Eliz.* c. 5. s. 21. but this statute does not extend to aliens. 31 *Eliz.* c. 10. s. 20.

Stat. 3 *Jac.* I. stat. 1. c. 7. intituled, "An act to reform the multitudes and misdemeanors of attornies and solicitors at law, and to avoid unnecessary suits and charges in the law," enacts, that no attorney shall be allowed from his client or master, any fee, &c. given to a serjeant or counsellor at law, or any sum paid for copies to any clerk, &c. without a ticket subscribed by such serjeant, &c. And attornies shall also give a true bill to their masters, &c. subscribed in their own hand and name, before they shall charge their clients.

Willingly delaying his client's suit to work his own gain, demanding by his bill any other sums of money, or allowance upon his account which he hath not laid out, subjects attorney to action, costs, and treble damages, &c. to be discharged from being an attorney or solicitor any more. *Ibid.*

This statute makes other provisions, but the matter of these is more extended by subsequent acts.

Stat. 13 *W.* III. c. 6. prescribes the form, &c. of the oath of allegiance, which every attorney is to take to government on penalty of being disabled.

By stat. 21 *G.* I. c. 29. revived and made perpetual by stat. 21 *G.* II. c. 3. Any person convicted of forgery, perjury, subornation of perjury, or common barrety, and practising as attorney in any court of law or equity in England, the judge of such court, on complaint and summary examination, may cause him to be transported for seven years.

The next statute in order of time is, 2 *G.* II. c. 23.

The first four clauses of this act having reference to the competency of persons to practice, living at the time of passing it, cannot be of present interest.

By section 5, no person who shall not before 1st December, 1730, have been admitted, shall be permitted to act as an attorney unless he shall have been bound by contract in writing to serve as a clerk, for and during the space of five years, to an attorney, and that such person for and during such term of five years, shall have continued in such service, and also unless such person, after said five years, shall be examined, &c.

6. The judges, before they admit such person as is mentioned in the last clause to take the oath, are to examine his fitness, and

being satisfied, after administering the oath hereafter directed, are to cause him to be admitted an attorney in such court, and his name to be enrolled as an attorney in such court, without other fee than 1s. for the oath: such admission to be written on parchment, properly stamped, and delivered to the person so admitted.

7. Same section as the 5th, applied to a solicitor in the courts of equity.

8. Same section as 6, applied to a solicitor in the courts of equity.

The 9th section applies to persons living, at the time of the passing of the act. Temporary clause.

10. Any person, being an attorney or solicitor, may with the written consent of an attorney or solicitor of another court, sue out writs, &c. in such court, notwithstanding such person is not admitted an attorney of such court. Where attorney by consent, may sue out writs, &c. in another court.

11. The judges not to admit to be attorneys of any court, a greater number than by ancient usage and custom of such court, hath been heretofore allowed. Where judges not to admit greater number of attorneys.

12. A clerk, on the death of the attorney or solicitor, with and to whom he shall have been by contract bound, or if the contract shall by mutual consent be vacated, or in case such person or clerk shall be legally discharged by rule of the court in which the attorney or solicitor shall practice, before the expiration of the five years, a service of the residue of the said five years to another attorney or solicitor respectively by contract in writing, shall be deemed to be good and effectual. And see sect. 17, stat. 22 G. II. c. 46. Where clerk, on master's death, &c. may serve residue.

13. & 14. Oath of an attorney or solicitor [as such], viz.

I, *A. B.* do swear, that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability. *So help me God.* Attorney's oath.

15. No attorney or solicitor to have more than two clerks at one time, but by the 16th section the prothonotaries of the C. P. and the secondary of the K. B. and the several prothonotaries of the respective courts of Chester, Lancaster, and Durham, and of the courts of the Great Session in Wales, are allowed to have three, and such clerks may be admitted as attorneys of the courts of law aforesaid. Number of clerks limited.

By sect. 17. it is enacted, that if any attorney of the courts previously specified, shall knowingly and willingly permit or suffer any other person or persons to sue out any writ or process, or to commence, prosecute, follow, or defend any action or actions, or other proceedings in his name, not being a sworn attorney of one of the said courts, or solicitor, &c. and shall be thereof lawfully convicted, every person so convicted shall, from the time of such conviction, be disabled and made incapable to act as an attorney in any of the courts of law aforesaid; and the admittance of such attorney of any of the said courts of law shall from thenceforth be void *. And see stat. 12 G. II. c. 13. s. 11. Attorney not to permit any person to practise.

* The practising attorney should read with attention the above section; instances frequently occurring where it was evident that the offence contem-

plated in such section had very inadvertently been committed by the attorney. See the late case, *In the matter of Jackson and Wood*, 1 B. & C. 270.

Where enrolled.

Temporary
clause.
Where attorney
admitted solicitor.

Where solicitor
of one, admitted
solicitor of an-
other court of
equity.
Where name of
attorney to be
written on every
writ, &c.

Not to bring
action for fees
until one month.

Reference, &c.
for taxation, &c.

18. Directs the enrolment of attorneys by the proper officers of the court, namely, the chief clerk of K. B. and clerk of the warrants of C. P., &c. without fee or reward, in alphabetical order; to which enrolment all persons are to have access without fee or reward.

19. Exemption from stamp duties, inapplicable now.

20. Any person enrolled in the courts above mentioned, may, on examination, &c. be admitted a solicitor in any of the courts of equity aforesaid, without fee for the oath or stamp.

21. So a sworn solicitor of one court of equity may, on examination, &c. be admitted a solicitor of any other court of equity.

22. Enacts, that every writ and process for arresting the body, and every writ of execution, or some label annexed to such writ or process, and every warrant that shall be made out upon such writ or process, or execution, shall, before the service or execution thereof, be subscribed or indorsed with the name of the attorney, clerk in court, or solicitor by whom such writ, &c. shall be sued forth, suing forth the same, and where such attorney, &c. shall not be the person immediately retained or employed by the plaintiff, then also with the name of the attorney, &c. so immediately retained and employed, and the copy that shall be served upon said defendant shall, before service thereof, be in like manner subscribed with the name of the attorney, &c. who shall be immediately retained or employed by the plaintiff.

23. No attorney of the courts K. B., C. P., or Exchequer, or Duchy of Lancaster, or Great Sessions in Wales, or courts of counties palatine, or any other court of record of England, where attorneys have been customably sworn, nor any solicitor in Chancery, Exchequer Chamber, Duchy of Lancaster at Westminster, or courts of counties palatine, or of Great Sessions in Wales, or any other inferior courts of England, shall maintain any action or suit for the recovery of fees, charges, or disbursements at law or in equity, until the expiration of one month after such attorney shall have delivered to the party to be charged therewith, or left for him at his dwelling-house or last place of abode, a bill of such fees, &c. written in a common legible hand, and in the English tongue, except law terms and names of writs, and in words at length, except times and sums, which said bill shall be subscribed with the proper hand of such attorney or solicitor, at the last or usual place of abode of the person who shall be charged therewith; such bill, on application to the lord chancellor, master of the rolls, judges, &c. of the court where the greatest part of the business in amount or value, hath appeared to have been transacted; and upon the submission of the said party to pay the whole sum that upon taxation shall appear to be due to the said attorney, &c. to be referred by the lord chancellor, &c. to be taxed and settled by the proper officer of such court.

Attorney refusing to attend such taxation, the officer may tax the bill *ex parte*; (pending the reference no action is to be brought) payment of what is found due on such taxation to be a full discharge; party refusing to pay, liable to an attachment for contempt. If attorney, &c. appear on taxation to have been overpaid, to refund; refusing to re-pay what he has been overpaid, the

attorney is liable to attachment or process of contempt, or such other proceedings as the parties shall elect. If the bill taxed be less by a sixth part than the bill delivered, the attorney, &c. is to pay the costs of taxation, if not less, the court is invested with discretion to charge the amount of taxation on the attorney or on the client, in regard to the reasonableness or unreasonableness of such bill.

24. Any person in his own name suing out writ, &c. or defending, &c. as an attorney, &c. for gain, without being admitted and enrolled, to forfeit 50*l.* to the use of the prosecutor, and is incapable of recovering any fee, &c. for such proceeding. Penalty, &c.

25. Mode of recovering penalty; viz. action of debt, bill, plaint, or information in the courts, &c.; action to be commenced in twelve months after offence, statute gives treble costs.

26. Not to extend to the examination, swearing, admission, or enrolment of the six clerks in Chancery, or the sworn clerks in their office, or the waiting clerks belonging to the said six clerks, or the cursitors of the said court, or of the clerks of the petty-bag office, or the clerks of the king's coroner and attorney in K. B., or the filazers of K. B. and C. P., or of the attornies of the courts of the counties palatine of Lancaster, Chester, or of the lord mayor and sheriffs courts of London for the time being. Who exempted.

27. Nor to the attornies or clerks of the offices of the king's remembrancer, treasurer's remembrancer, pipe, or office of pleas in the court of Exchequer at Westminster for the time being; but such attornies, &c. may practice in the Exchequer or in any other of the said courts of record, in the name, and by consent in writing, as usual before the statute.

28. Nor to the solicitors of the treasury, customs, excise, post-office, salt or stamp duties, or of any other branch of the revenue, for the time being; nor to the solicitor of the city of London for the time being, nor to the assistant to the council for the affairs of the admiralty and navy.

By stat. 6 G. II. c. 27. s. 11. attornies of the superior courts, being otherwise qualified, may be admitted attornies according to the custom of inferior courts. What attornies admitted of inferior courts.

This act was explained, amended, and continued by stat. 12 G. II. c. 13. and from the period therein limited, it was by stat. 22 G. II. c. 46. further explained, amended, and continued to the 24th June, 1757, and from thence to the end of the next session of parliament, and by stat. 30 G. II. c. 19. s. 75. made perpetual.

By stat. 12 G. II. c. 13. s. 4. the not indorsing the name of the attorney, &c. on warrant that shall be made out on any writ, &c. shall not vitiate the writ; and all sheriffs or other officer who shall make out any warrant upon any writ, &c. and shall not subscribe or indorse the name of the attorney, &c. who sued the same, shall forfeit 5*l.* to be assessed by the court out of which such writ, &c. shall issue, one moiety to the king, and the other moiety to the party aggrieved by the omission. What shall not vitiate writ, &c.

By sect. 5, attornies, &c. may use common abbreviations in their bills of fees, &c. Penalty on sheriff not subscribing attorney's name.

By sect. 6, the stat. 2 G. II. not to extend to any bill of fees between one solicitor and another. Where abbreviations may be used
To what statute 2 Geo. 2. not to extend.

Who not to act
in county courts.

How Quaker ad-
mitted.

No attorney, pri-
soner, to sue or
prosecute, &c.

May carry on
suits already
commenced.

Affidavit of the
execution of the
articles to be
filed.

To be read in
court before ad-
mission.

With whom affi-
davits filed.

Who to provide a
book; searched
gratis.

Where shall not
take a clerk.

By sect. 7, persons not qualified according to the 2 G. II. not to act in the county court on penalty of 20*l*.

By sect. 8, a Quaker otherwise qualified by said act, may be admitted on affirmation instead of oath.

By sect. 9, no attorney or solicitor, if a prisoner in any gaol, &c. rule, &c. shall, during his confinement, sue or prosecute any suit in his own name, or in that of any other attorney or solicitor; all proceedings in any such actions or suits shall be void, and such attorney or solicitor, as also the attorney or solicitor permitting or empowering him so to use his name, shall be struck off the roll and incapacitated for the future.

Sect. 10 allows an attorney or solicitor so confined, to carry on or transact all suits, &c. commenced before his confinement.

Stat. 22 G. II. c. 46. s. 2. continues these last enactments, together with those of stat. 2 G. II., to 24th June, 1757, and from thence to the end of the next session of parliament, and by

Sect. 3, enacts, that every person bound by contract in writing to serve as a clerk to an attorney or solicitor, shall, within three months next after the date of every such contract, cause an affidavit of the actual execution of such contract to be made, in which affidavit the names of every such attorney or solicitor, and of the person so bound, and their places of abode, and the date of the contract, shall be specified; affidavit is to be duly filed within said time, in the court where such attorney, &c. shall be enrolled with the proper officer, &c. who is to sign a memorandum of the day of filing it at the back or bottom of such affidavit; his fee by s. 6. is 2*s*. 6*d*.

By sect. 4, no person to be admitted before such affidavit shall be openly read in such court where such person shall be admitted an attorney or solicitor. *

Sect. 5, specifies the officers with whom to file such affidavits, viz. in Chancery, the senior clerk of the petty bag; K. B. the chief clerk of that court; C. P. the clerk of the warrants; Exchequer, the king's remembrancer; the court of the Duchy of Lancaster at Westminster, the chief clerk of that court; and in the several counties palatine of Chester, Lancaster, and Durham, the respective prothonotaries of the said counties palatine; and in the several courts of the Great Sessions in Wales, the respective prothonotaries of the said courts, or with the respective deputy or deputies of all these officers.

By sect. 6, these officers are to keep a *book*, wherein shall be entered the substance of these affidavits, and such officers may take, on filing the affidavit, 2*s*. 6*d*. and such *books* may be searched without fee.

By sect. 7, no attorney or solicitor shall take or retain any clerk who shall become bound, &c. after such attorney shall have left off business, or shall not actually practise.

* Notwithstanding these clauses, indemnity acts are often passed for the relief of persons who have neglected

to file such affidavits within the time mentioned.

By sect. 8, every person so bound, &c. shall be actually employed by such attorney, &c. or his agent, &c. in the proper business of an attorney, &c. But see stat. 1 & 2 G. IV. c. 48. and stat. 3 G. IV. c. 16. abstracted, *post*.

Clerks to be actually employed.

By sect. 9, if the attorney, &c. to whom any person shall be bound, shall die, or discontinue practice, or if the contract shall by mutual consent be cancelled, or in case the clerk shall be legally discharged by any rule of court before the expiration of the term, and such clerk shall be bound by another contract in writing to serve, and shall serve as clerk to any other attorney, &c. during the residue of the five years, such service shall be good, so as an affidavit of the execution of such second contract be duly filed, as before directed concerning such original contract.

In case of death of master, &c.

By sect. 10, before admission as an attorney or solicitor, every person shall cause to be duly filed, an affidavit of himself, or of the attorney or solicitor to whom he was bound, of having *actually and really* served and been employed by such practising attorney, &c. or his or their agents, during *the whole* of five years. But see stat. 1 & 2 G. IV. c. 48. and stat. 3 G. IV. c. 16. abstracted, *post*.

Where service under another contract good.

When affidavit of service, &c. to be filed,

By sect. 11, after reciting that divers persons who are not examined, sworn, or admitted to act as attorneys or solicitors in any court of law or equity, do, in conjunction with, or by the assistance or connivance of certain sworn attorneys and solicitors, and by various subtle contrivances, intrude themselves into, and act and practise in, the office and business of attorneys and solicitors, to the great prejudice and loss of many of his Majesty's subjects, and the scandal of the profession of the law, enacts, that if a sworn attorney or solicitor shall act *as agent* for any person not qualified to act as an attorney, &c. or *permit* or suffer his name to be in any ways made use of upon the account, or for the profit of any unqualified person, or send any process to such unqualified person, thereby to enable him to practise in any respect as an attorney or solicitor, knowing him not to be qualified, shall, on complaint made to the court in a summary way, be struck off the roll, and for ever disabled from practising as an attorney; and such unqualified person so acting, &c. may be committed for any time not exceeding a year.

Permitting an unqualified person to act.

By sect. 12, no person not admitted an attorney, and continuing on the roll, shall act at any general or quarter sessions of the peace, on penalty of 50*l.* to be recovered, &c. with treble costs; and an attorney is not to permit any person, not admitted and enrolled as aforesaid, to make use of his name in the courts of general or quarter sessions, under the like penalty of 50*l.* to be recovered, &c. as aforesaid.

Who restrained from acting at quarter sessions. Attorney not to permit any person not admitted to act there.

By sect. 13, the act not to deprive attorneys of the Duchy of Lancaster, or of the courts of Great Sessions in Wales, or of the counties palatine of Chester, Lancaster, and Durham, from acting within their respective jurisdictions.

Who may act within their respective jurisdictions.

By sect. 14, no clerk of the peace, or his deputy, no undersheriff or his deputy, shall act as a solicitor to sue out any process at any general or quarter sessions of the peace, where he

Who shall not act at quarter sessions,

shall execute the office of clerk of the peace or deputy, or undersheriff or deputy, on penalty of 50*l*.

The 15th section appears to have been temporary.

Who may be admitted solicitors.

By sect. 16, any person admitted a sworn clerk in the office of the Six Clerks in Chancery, or who shall have been bound for five years, by contract to such sworn clerk, or who shall have served three years, and shall have been admitted a waiting clerk, and acted as such for five years, may be admitted a solicitor.

As to clerks, whose masters clerks in Chancery have died.

By sect. 17, the service of clerks, whose masters, sworn clerks of the Six Clerks Office, have died, &c. entering into fresh contracts, and serving the residue of their time, is rendered good and effectual.

Where number of clerks restrained.

By sect. 18, no sworn clerk in the Six Clerks Office is to have more than two clerks at the same time, including the clerk who shall be entered on the roll kept by the master of the rolls, or his secretary, for that purpose.

Exemptions.

Sect. 19. exempts the attornies or clerks of the officers of the king's remembrancer, treasurer's remembrancer, pipe, or office of Pleas in the Exchequer at Westminster, for the time being, from the operation of this act.

Omission in former acts supplied.

By stat. 23 G. II. c. 26. s. 15, an omission in the 2 G. II. is supplied; by this last statute, viz. 23 G. III. c. 23. s. 10. any person admitted an attorney, may be also admitted without fee for the oath, stamp, &c. a solicitor in all or any of the courts of equity; but the same act contains no provision for the like admission of persons sworn and enrolled as solicitors in the courts of equity, &c. to be enrolled as attornies of his majesty's courts of law.

This act supplies such omission, and by that statute solicitors duly admitted in any of his majesty's courts of equity, may be also admitted attornies of K. B. and C. P. without fee for the oath or stamp, on examination, &c. pursuant to the 2 G. II. and other the laws in force concerning attornies and solicitors.

To what courts of conscience attornies amenable.

By stat. 24 G. II. c. 42. attornies and solicitors are amenable to the court of conscience of Westminster.

By stat. 30 G. II. c. 19. s. 75, the stat. 2 G. II. explained, amended, and continued, by statutes 12 & 23 G. II. is made perpetual.

Statutes imposing stamp upon clerk's articles.

By stat. 34 G. III. c. 14. s. 1.; 44 G. III. c. 98. sched. A.; 48 G. III. c. 149. sched. part I. stamp duties imposed upon the clerk's articles, and such duties are augmented and extended by other statutes; and by stat. 55 G. III. c. 184. sched. part I., at present settled. The last is a general stamp act, to be presently mentioned.

Contract to be stamped and enrolled.

By stat. 34 G. III. c. 14. s. 2, no person, who by any such contract made after the 5th and 10th days of February, 1794, shall be bound to serve as a clerk, shall be admitted solicitor or attorney in any of the courts specified, unless the indenture or writing containing such contract duly stamped, shall be enrolled or registered with the proper officer of the court wherein such person shall propose to be afterwards admitted a solicitor or attorney, by virtue of his service under such contract, together

with an affidavit of the time of the execution of the contract by such clerk. And in case such indenture, &c. shall not be enrolled in such court within six months next after the execution thereof, together with such affidavit of the time of the execution of the contract, then the service of such clerk under such indenture, &c. shall be deemed to commence from the time of such enrolment only, and not from the execution of such indenture, &c.

By sect. 3, every person to be admitted a solicitor, &c. in any of the courts by virtue of any contract and service under the same, before he shall be permitted to practise, or be inrolled, shall make an affidavit of the due payment of the duty by the act imposed, and shall insert in such affidavit the sum paid in respect thereof, and specify the name and place of abode of the person with whom such contract of service was entered into, the time of the execution thereof, and the time of enrolling the same; and in case such person shall have been previously admitted a solicitor or attorney in some other court, he shall specify in such affidavit, the court in which he has been so admitted, and the time of his admission therein; and shall cause the same to be duly filed in the court in which he proposes to be so admitted a solicitor or attorney with the proper officer; and every such affidavit shall be produced and openly read in the court in which such person shall be admitted a solicitor, &c. before he shall be enrolled therein.

Affidavit of payment of duty.

Sect. 4, further enacts, that in case any person other than such who shall have been admitted an attorney in one of the courts of Great Sessions, or of the counties palatine, or in some other court of record in England, where attorneys have been customably admitted and sworn by virtue of a contract made before the 5th and 10th days of February, 1794. respectively, and a service in pursuance thereof, or who shall have been admitted a solicitor in one of the said courts of Great Sessions, or of the said counties palatine, or some other inferior court of equity in England, by virtue of a like contract and service, and according to the directions of the several acts now in force for the regulation of attorneys and solicitors respectively, shall, in his own name, or in the name of any other person, sue out any writ, &c., or commence, prosecute, or defend any action, &c. in any of the said courts at Westminster as an attorney or solicitor, for or in expectation of any gain, fee, or reward, without being admitted and enrolled an attorney or solicitor in one of the said courts at Westminster, every person shall, for every such offence, forfeit 100*l.*; one moiety to the king, and the other to the person who shall sue, with full costs.

Where admission into a court of Westminster necessary.

And such person is by the same clause incapable to maintain or prosecute any action, &c. for his fees, &c. on account of prosecutions, &c. any such action, &c.*.

Where cannot recover fees.

* It will be obvious, therefore, that attorneys admitted into one of the courts of Great Sessions in Wales, or of the counties palatine, &c. since Feb. 1794, may not practice in the

courts at Westminster without previous admission therein; neither can he be admitted therein unless the higher duty were paid upon his articles.

By sect. 5. any person who shall be admitted to be a solicitor or attorney in any court at Westminster, by virtue of, and service under such contract, and shall have paid the duty by that act imposed, may be admitted to be a solicitor or attorney in all or any of the courts in that act mentioned, without payment of any further stamp duty in pursuance of that act, subject nevertheless to all and every the provisions prescribed by law with relation to the admission of solicitors and attorneys in such courts respectively, before the passing of that act."

By sect. 6. any person who shall be admitted a solicitor or attorney in any of the courts of Great Sessions in Wales, or in any court in the counties palatine, or in any inferior courts in the statute mentioned, by virtue of, and service under any such contract, and shall have paid the duty of 50*l.* [since augmented to 60*l.* by stat. 55 G. III. c. 184,] may be admitted a solicitor or attorney in any of the courts mentioned in the statute, except the courts of Westminster, without payment of any further stamp duty in pursuance of that act, subject, nevertheless, to the like provisions and restrictions of former laws in relation to such admissions.

Stamp duties on articles.

By stat. 55 G. III. c. 184. sched. part I. a duty of 120*l.* is imposed upon the contract, whereby any person shall first become bound to serve as a clerk, in order to his admission as an attorney or solicitor in the courts at Westminster, and a duty of 60*l.* in any of the courts of Great Sessions in Wales, or counties palatine of Chester, Lancaster, and Durham, or in any other court of record in England, holding pleas, where the debt or damage amounts to 40*s.*; and a counterpart or duplicate is by the same statute subjected to a duty of 35*s.*

And these duties are in lieu of all former duties previously imposed as well on the contract as on the premium paid with the clerk.

The several statutes by which a duty is imposed upon an annual certificate, to be taken out by every practising attorney, &c., will be found under the title CERTIFICATE; *Attorney's Certificate*, which see, *post*.

Effect of degree at the universities, &c.

By stat. 1 & 2 G. IV. c. 48. s. 1, it is enacted that in case any person who shall have taken, or who shall take the degree of bachelor of arts, or bachelor of law, in either of the universities of Oxford, Cambridge, or Dublin, shall, at any time after he shall have taken or shall take such degree, be bound by contract in writing to serve as a clerk for and during the space of three years to an attorney, or to a solicitor, or to a six clerk, and during the said term of three years shall continue in such service, and during the whole time of such three years service shall continue and be actually employed by such attorney, &c. or his agent, in the proper business, practice, or employment of an attorney or solicitor, and shall cause an affidavit, or being one of the people called quakers, a solemn affirmation of himself, or of such attorney, &c. to whom he was bound as aforesaid, to be duly made and filed, that he hath actually and really so served and been employed during the said whole term of three years, as is required of persons

to serve for the term of five years, shall be qualified to be admitted and enrolled as an attorney or solicitor respectively (according to the nature of his service) in the several and respective courts of law or equity, as fully and effectually to all intents and purposes, as any person having been bound and having served five years is qualified to be admitted or enrolled under the several acts mentioned.

By sect. 2, it is enacted, that if any person who now is or shall be bound by contract in writing, to serve as a clerk as aforesaid for the space of five years, shall actually and *bonâ fide* be and continue as pupil to any practising barrister, or to any person *bonâ fide* practising as a certificated special pleader in England or Ireland, for any part or parts of the said term of five years, not exceeding one year, the judge or other sufficient authority to whom such person shall apply to be admitted as attorney or solicitor, upon affidavit, &c. of such clerk and of such barrister or special pleader, being satisfied that such person so applying for admission had actually and really been and continued with, and had been employed as pupil by, such practising barrister or special pleader as aforesaid (but not otherwise) may admit such person as attorney or solicitor, in like manner as is now done in cases where the clerk has served part of the term of his clerkship with the agent of the person to whom he has been bound.

Effect of serving part of time with barrister, &c.

By sect. 3. the stat. 41 G. III. c. 79. not to extend to the registrars or solicitors of the universities of Oxford and Cambridge, or to the steward or solicitors of any college or hall within the said universities, or to the chapter clerk of any cathedral or collegiate church acting only as such registrars, solicitors, stewards, or chapter clerks.

Exemptions.

By sect. 4. Nor to any person who shall have taken, or who shall take such degree of bachelor of arts, unless such person shall have taken, or shall take such degree within six years next after the day when such person shall have been or shall be first matriculated in the said universities respectively, nor to any person who shall take or shall have taken such degree of bachelor of law within eight years after such matriculation; nor to any person who shall be bound by contract in writing to serve as a clerk to any attorney, &c. unless such person shall be so bound within four years next after the day when such person shall have taken such degree.

Within what time degree to be taken.

By statute 3 G. IV. c. 16. the statute 1 & 2 G. IV. c. 48. shall not extend to any person who shall take or shall have taken such degree of bachelor of law as in the said act is mentioned, unless such person shall have taken or shall take such last mentioned degree within eight years after such matriculation, as in the said act is mentioned, and so much of the said act is thereby repealed, whereby it is provided that said act shall not extend to any person who shall take or who shall have taken such degree of bachelor of law within eight years after such matriculation.

To whom statute 1 G. 4. not to extend.

II. *Abstract of Rules and Orders.*

The rules and orders of the respective courts in relation to attornies enrolled therein, remain to be noticed; but reference to

ATTORNEY; II. *Abstract of Rules and Orders.*

No attorney to be lessee in ejectment, or bail.

Attorney bail, how punishable.

Extends to clerks.

As to change of attorney.

Accepting warrant to appear, how enforced.

Attorney to attend master.

As to filing pleas.

When not to attend on judge.

When to apply to be admitted C. P.

As to entry of name and residence.

Who may not take articulated clerks.

such as no longer particularly regulate the practice will rarely be necessary. Those also which have been superseded by legislative provisions, or by later decisions of the courts, and those which relate to current points of daily practice will be passed over.

For the prevention of maintenance and brocage no attorney to be lessee in an ejectment, nor bail for a defendant in K. B. in any action. *R. M.* 1654.

No attorney shall be lessee in an ejectment, nor bail for a defendant in this court in any action. *R. G. M.* 1654; and as to attorneys not being allowed to become bail it is enforced by *R. G. M.* 14 G. II. 1740, and is punishable by the court for being guilty of a breach of the rule. *Thompson v. Rosbell, Doug.* 466. By construction the rule extends to clerks to attorneys.

Attorney not to be changed or shifted without rule of court, order of judge, or prothonotary, and notice to the adverse party, or his attorney. And attorney newly coming in to take notice, at his peril, of the rules whereunto the former attorney was liable had he continued. *R. G. M.* 1654.

That an attorney of either bench accepting a warrant, or subscribing a process, declaration, or warrant to appear, be compelled to cause an appearance, or liable to an attachment, or put out of the roll as the case requires; and the party not to be received to countermand such appearance after retained. *R. G. M.* 1654. s. 10.

An attorney is to attend the master on his appointment, on forfeiture of 10s. *R. G. H.* 15 Car. II.

No attorney shall deliver to any other attorney or person, or accept from any other attorney or person any plea that ought to be left in the office of the clerk of the papers, or a copy of such plea before the same be left therein under the penalty of 10s. for the first and 20s. for the second offence, to be paid to the box for the use of the poor, and for the third offence the attorney to be expelled the court. *R. T.* 1664.

An attorney is not to be summoned to attend at a judge's chambers during the sittings of the court at Westminster. *R. G. M.* 11 G. I. K. B. H. 17 G. II. reg. 1. C. P.

Whoever would be admitted an attorney, must apply for that purpose before the last week in term. *R. G. M.* 2 G. II.

Every attorney practising in K. B. and residing within ten miles of London or Westminster, shall enter in alphabetical order in a book to be kept at the master's, his name and place of abode, or some other proper place in London or Westminster, where he may be served with notices, summonses, &c. and service (not being required to be personal) at such place, shall be deemed good service; and if attorney shall neglect so to enter his name, &c. fixing up the notice, &c. in the master's office, shall be deemed good service. *R. G. H.* 8 G. III.

No attorney employed as a writer or clerk to another attorney shall, during such employment, take or have any clerk under articles; service to such attorney not good service; no person entering into articles with an attorney shall serve the agents of such attorney more than a year. *R. G. T.* 31 G. III. 4 T. R. 379.

Every person applying for admission as an attorney in K. B. not before admitted in any other court, is, for a whole term previously to such application, to cause his name and place of abode, and also of the attorney to whom he shall have been articulated, to be put up on the outside of the courts of K. B. C. P. in such place as public notices are usually affixed, and in the K. B. and C. P. office, and shall enter such names and places of abode in a book at each of the judges' chambers, *Id. ib.* and R. G. T. 33 G. III. 5 T. R. 368.

Notice previously to application for admission.

Every person applying to be admitted an attorney of C. P., (unless already an attorney of K. B. or solicitor, &c.) must file his articles of clerkship with the secondary, together with affidavits of the execution, due service, and notice, R. G. T. 37 G. III. 1 B. & P. 90. See tit. MEMORANDUM OF WARRANT TO PROSECUTE OR DEFEND, *post*.

III. Cases, &c. on Articles of Clerkship and Admission.

The statutes relating to articles of clerkship, before abstracted under the general head ATTORNEY, sect. 1. are statutes 2 G. II. c. 23. s. 5; 22 G. II. c. 46. s. 3; 1 & 2 G. IV. c. 48; 3 G. IV. c. 16.

Those referring to matters of revenue, &c. are statutes 34 G. III. c. 14. s. 2; 48 G. III. c. 149; 55 G. III. c. 184.

It may be necessary to refer to R. T. 31 G. III. K. B. T. 33 G. III. and to R. T. 37 G. III. C. P. *ubi supra* abstracted.

The articles of clerkship may be cancelled on the ground of collusion, as in *Frazer's case*, 1 *Bur.* 291. and the service under the same articles must be continued with the same master; though the first master consent to the service under the second. *Hill's case*, 7 T. R. 456; but this decision is not applicable where part of the service shall be performed with the regular agent of the master.

Where articles cancelled.

The court granted a rule upon the master to enrol a copy of the original articles of clerkship, such original articles having been lost. Admission under the fiat, of Best, J. took place upon production of the copy articles, and the usual affidavits of service, &c. *Ex parte John Clarke*, 3 B. & A. 610.

Where lost.

Articles of clerkship were duly stamped and executed, and transmitted to agents in town, for the purpose of being enrolled with the proper officer of the court. It appeared that in the agent's book there was an entry in the hand-writing of a clerk, who had left the country, of his having attended the enrolment, and paid a fee upon that occasion, but there was no entry of such an enrolment in the book kept at the master's office. The court refused to order the counterpart of the articles to be registered *nunc pro tunc*, or to order the party to be admitted an attorney. *Ex parte Pilgrim*, 1 B. & C. 264.

A clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the crown: Held, bad.

Where service bad.

What inserted in notice.

What objection after admission.

Disputes between attornies and clerks, how settled.

Return of premium.

that he could not, within 22 G. II. c. 46. s. 8 & 10, be considered as serving his whole time and term in the proper business of an attorney, and that he ought not to be admitted on the roll; and that having been admitted, he ought to be struck off. In re Taylor, gent. one, &c. 5 B. & A. 538.

Where an attorney's clerk has served part of his time with one attorney and part with another, to whom the articles were assigned, the name of the assignee must be inserted in the notice of intention to apply for admission. *Ex parte Stokes*, 1 Chit. R. 556.

The court refused to strike an attorney off the roll, on the ground that he had not served a regular clerkship, and had misconducted himself previously to admission. In the matter of Page, 1 Brod. & Bing. 160.

All disputes concerning attornies clerks and their articles, or money given with them, are to be regulated by the court. Burton's case, 2 Keb. 318. And the court upon rule discharged an article clerk, where the attorney to whom he was bound had become a bankrupt and absconded. *Anon.* 1 Chit. R. 558. n.

So also, where a clerk misconducted himself and left the service of the attorney to whom he was article clerk at the end of a year and a half, and the latter refused to take him back, in consequence of his previous misconduct, the court referred it to the master, who decided that a portion of the premium should be returned; and this decision was affirmed by the court, though the point in question had been decided otherwise in a suit in the Exchequer. *Ex parte Fisher*, 1 Chit. R. 694.

And K. B. ordered an attorney who had refused to take back an apprentice who had run away from his service, on the ground of misconduct, and with whom a premium had been given, to return to the parents of such apprentice a part of such premium. *Ex parte Frankerd*, 3 B. & A. 257.

IV. PRACTICAL DIRECTIONS

As to Articles of Clerkship and Admission. K. B.

Within three months after the execution of the articles of clerkship, the clerk must cause the affidavit, No. 1. FORMS, to be made before a judge in town, or commissioner in the country, and filed with the proper officer; the master if in K. B., the clerk of the warrants C. P.; pay 2s. 6d. filing the affidavit and registering the articles, which are to be left with him at the same time for that purpose.

On the expiration of the time, the rules above abstracted require that notice of the intention to apply to be admitted an attorney be duly given. See No. 2. tit. NOTICE, FORMS subjoined.

The notice is to be affixed one whole term previously to the intended application, on the outside of the court of King's Bench, Westminster Hall, and previously to such application the like notice must be entered in the book kept for that purpose at each of the judge's chambers, K. B.; and it must be put up for the term immediately preceding the term in which such application is intended to be made. *Ex parte Bonner*, 2 Marsh. 48. 6 T. 335. S. C.

The affidavit of due service of the time, pursuant to the articles, and of the above notices having been duly given, must also be made by the party. See No. 3. FORMS subjoined.

An affidavit of the payment of the duty, and of the due registry of the articles, must also be made and filed with the other affidavits with the proper officer of the court. See No. 4. FORMS subjoined.

Then apply to a judge for a fiat; take the part of the articles signed by the attorney with whom the clerkship has been served, with his certificate of the service indorsed thereon, together with the original affidavit of the due execution of such articles, to the judge's chambers; a fiat is then granted; carry same to the master's clerk, if in K. B., secondary C. P. The admission is engrossed on a 20l. stamp parchment; a day is appointed for the being sworn in open court, which being done, the admission is signed by the court, and you sign the roll on which the master, K. B., will have entered the name; and it seems also necessary that after admission the attorney, although he do not practice, should, within the year after his admission, take out his certificate, otherwise he must be re-admitted, and of course must be subject to all the forms on his first admission. *Ex parte Nicholas*, 2 Marsh. 123. 6 Taunt. 408. S. C.

V. PRACTICAL DIRECTIONS.

As to Articles of Clerkship and Admission. C. P.

The course in C. P. is nearly the same, mutatis mutandis. On the application for the fiat the original affidavit of the due execution of the articles of clerkship must be obtained from the clerk of the warrants; pay him 2s. 6d.; the secondary engrosses the admission, which is signed by the judge who examines you; pay judge's clerk 10s. 6d.; the clerk of the warrants enters the name on the roll.

The trifling differences as to the court, officers, &c. in the FORMS, will be duly noticed.

VI. FORMS

Relating to Articles of Clerkship and Admission.

[Court.]

_____, of _____, gentleman, maketh oath and saith, that by articles of agreement, bearing date the _____ day of _____ last past, and made between _____, of _____, gentleman, one of the attorneys of his majesty's court of King's Bench at Westminster, and a solicitor of the high court of Chancery of the one part, and _____, of _____, esquire, and _____, son of the said _____, of the other part; the said _____, for the consideration therein mentioned, did put, place, and bind himself clerk to the said _____, to serve him in the profession of an attorney at law, and solicitor in chancery, from the day of the date of the said articles, for the term of five years from thence next ensuing, and fully to be complete and ended, and which said articles were in due form of law executed by the said _____, _____, and _____, in the presence of this deponent, and _____, of _____, gentleman; and that the names _____, and _____, set and subscribed as witnesses to the due execution thereof, are of the proper hand-writing of this deponent and the said _____.

Sworn, &c.

(Signed) _____

Notice is hereby given that _____, now or lately under articles of clerkship to _____, of _____, attorney at law, [and if part of the time has been served to an assignee, the fact should be stated, to whom, &c.] intends to apply next _____ term to be admitted an attorney of his majesty's court of King's Bench. Dated this _____ day of _____, 18____.

VOL. I.

I

No. 1.

Affidavit of the execution of articles of clerkship.

No. 2.

Notice of intention to apply for admission.

ATTORNEY; VII. *Delivery, Taxation, &c. of Bill.*

No. 3.
Affidavit of due
service of the
time, and of the
notices having
been duly given.

_____, of _____ gentleman, maketh oath and saith, that he hath actually and really served and been employed by _____, as his clerk, in the practice of an attorney and solicitor, for the full term of five years, pursuant to the articles hereto annexed, and saith that he did, previously to last _____ term, affix the name and place of abode of the said _____ in the King's Bench, (*or Common Pleas*) office, and on the outside of the court of King's Bench (*or Common Pleas*) at Westminster Hall; and that he did also, previously to the same term, enter the like names and places of abode in the book kept for that purpose at the chambers of each of the judges of his majesty's court of King's Bench (*or Common Pleas*).

Sworn, &c.

(Signed) _____

No. 4.
Affidavit of pay-
ment of duty,
and of registry
of articles.

_____, of _____, gentleman, maketh oath and saith, that the duty of 120*l.* imposed on articles of clerkship by an act of parliament lately made and passed, was paid on certain articles of clerkship made between _____, of _____, gentleman, of the one part, and _____, of _____, and this deponent _____, son of the said _____, of the other part, bearing date the _____ day of _____, as appears by the stamp affixed on the said articles: And this deponent further saith, that the said articles were executed on the day of the date thereof, and were duly registered on the _____ day of _____, as appears by the certificate of _____ thereon.

Sworn, &c.

(Signed) _____

See tit. CERTIFICATE, *Attorney's Certificate, post.*

VII. *Cases on Delivery, Taxation of, and Action for, Attorney's Bill.*

Cases as to de-
livery, &c. of bill.

The bill must be left with the defendant a month before action brought. *Brookes, one, &c. v. Mason*, 1 *H. Bl.* 290. *Winter and another v. Payne*, 6 *T. R.* 645. *Peake C. N. P.* 102. 3 *Esp. R.* 149; but it was said *arguendo*, that from necessity the debt for business done as an attorney, is not for the purpose of issuing a writ of *ne exeat regno*, liable to the objection that the bill had not been delivered under the above act. *Jones v. Alephsin*, 16 *Ves.* 470, 1; neither is it for the purpose of issuing a commission of bankruptcy. *Ex parte Steele, Id.* 161. 6. And see *post*.

And though the whole of the bill be for business done at the quarter sessions, the bill must be signed and delivered a month before action brought. *Clarke v. Donovan*, 5 *T. R.* 694.

Bill for agency need not be delivered a month before action brought, pursuant to the act. 1 *Sel.* 28.

Though the business be done before one of the parties is admitted an attorney, yet bill need not be delivered a month if both parties are attorneys at the time of action being brought. *Ford v. Maxwell*, 2 *H. Bl.* 589.

For the purpose of set off it need not, but it must not be produced on trial by surprise. *Hooper v. Till, Doug.* 199. n. *Martin and Wife, administratrix, v. Winder, one, &c. E.* 23 G. III. K. B. cited in the notes to the last case. *Bulman v. Birkett*, 1 *Esp.* 449. S. C.

And it seems that it may contain usual and common abbreviations, such as would be intelligible to a professional man. *Reynolds, gent. one, &c. v. Caswell*, 4 *Taunt.* 193.

So a mistake in the date of the items, which does not mislead, does not vitiate its delivery a month before the action brought. *Williams v. Baxter*, 4 *Taunt.* 806.

And leaving it at the counting-house bad. *Hill v. Humphreys*, 2 *B. & P.* 343. So taking it back, vitiates delivery, 1 *H. Bl.* 290. cited *infra*, p. 132; but a delivery to the attorney of the client under a judge's order, will be deemed sufficient to found an action thereon. *Vincent, one, &c. v. Slaymaker*, 12 *East*, 372.

And where two persons are liable to an attorney for business done on their joint retainer, it is sufficient for him to deliver a copy of his bill in pursuance of 2 *G. II. c. 23. s. 23*, to one of them, from whom he received his instructions, and to whom the management of the business was left by the other. *Aliter* of a delivery to that one who did not intermeddle; for he cannot be considered as having authority to receive it for both, nor is he likely to know what foundation there is for the charges in the bill. *Finchett v. How and Tarratt*, 2 *Campb. R. N. P.* 277.

So delivery to the attorney of the party to be charged, if he attend the taxation, or the bill be shewn to have come to his hands. *Warren, gent. v. Cunningham*, 1 *Gow.* 71.

The delivery of the bill is conclusive against increase of charge, and *presumptive* evidence against adding items. *Loveridge v. Botham*, 1 *B. & P.* 49. though real errors may be rectified. *Id. ib.*

And it seems that before an attorney's bill has been settled and paid, it may be taxed as a matter of course at any distance of time. *Per cur. T. 34 G. III. K. B.* 1 *Tidd*, 96. Where taxable.

An attorney's bill may be referred for taxation after verdict for the full amount. *Nuttall v. Mar*, 3 *D. & R.* 33.

But after it has been settled and paid, and after long acquiescence, reference for taxation is not a matter of course. *Say. Costs. Hooper v. Till, Doug.* 199. And such long acquiescence appears to have influenced the court upon other actions. See *P. R.* 37.

A bill for business done by a deceased attorney, for a recovery of which an action is brought by his executors, may be referred for taxation. *Penson, executrix, v. Johnson*, 4 *Taunt.* 724.

If any of the items of a bill be taxable, and others not, and the bill be not *duly* delivered, plaintiff cannot recover the items not taxable, *Doug.* 199; even though unconnected with professional capacity, *ib.*; but if at the defendant's request, an attorney pay the debt and costs, he may recover the money so paid, without delivering a bill under the statute. *Prothero v. Thomas*, 6 *Taunt.* 196.

The charge of drawing and engrossing an affidavit of debt, paid for swearing, &c. held to be proceedings in the court, and that therefore the bill containing that charge was within the statute 2 *G. II. c. 23*, being a beneficial statute, ought to receive a beneficial construction.

So a charge for a *dedimus potestatem*, though the remainder of the bill were for conveyancing. *Ex parte Prickett*, 1 *N. R.* 266.

So a charge for preparing a warrant of attorney, and this, although it be not executed. *Weld v. Crawford*, 2 *Stark.* 538.

Where taxable
(continued).

But if an attorney have a demand for taxable business, and also for conveyancing, and deliver no bill, it seems he may recover for conveyancing only. *Hill v. Humphreys*, 2 B. & P. 345.

But if he have delivered separate bills, they will both be referred. *Say. R.* 235. *Say. Costs*, 320. S. C.

And where *A.*, an attorney, at the request of *B.*, who is in custody for debt in an action in which *A.* has not been concerned, gives an undertaking for the debt and costs, which he accordingly pays to the plaintiff's attorney without paying the costs taxed, it was held, that this was not a disbursement by *A.* as an attorney, within the meaning of 2 G. II. c. 23. s. 23. *Prothero v. Thomas*, 1 Marsh. 539. 6 Taunt. 196. S. C.

But a charge for preparing the affidavit of the petitioning creditor's debt and bond to the chancellor, in order to obtain a commission of bankruptcy, is not a taxable item in an attorney's bill, within 2 G. II. c. 23. s. 23. as being a charge at law or in equity, the affidavit not being sworn, nor a commission issued. *Burton v. Chatterton*, 3 B. & A. 486.

But charges for holding the courts leet of a manor by the steward, are charges for business connected with his professional character of an attorney, and therefore are like conveyancing charges, taxable when found in a bill containing other taxable items. *Luxmore, gent. one, &c. v. Lethbridge, one, &c.* 5 B. & A. 898.

But not for conveyancing, that being recoverable on a *quantum meruit*. *Hillier v. James*, Bar. 41. And see *Anon. M.* 12 G. II. 1 Tidd, 93.

Bill for agency is now on motion referable for taxation. See note subjoined to *Hooper v. Till*, Doug. 199. in both courts.

Yet an attorney's bill for obtaining a bankrupt's certificate, must be signed and delivered a month before he can sue thereon. *Collins v. Nicholson*, 2 Taunt. 321.

And bill for business done wholly at quarter sessions is taxable. *K. B. Ex parte Williams*, 4 T. R. 496; but see *Id.* 124. Bar. 122, *contra*.

So bill for business done in a criminal case in court of Great Sessions, Wales. *Lloyd v. Maund*, T. 25 G. III. K. B. 1 Tidd, 94.

So a crown solicitor's bill for business done under an extent in Exchequer. *The King v. Partridge*, T. 56 G. III. in the Exchequer, 1 Tidd, 94. *The King v. Williams*, 3 Price, 280. West on Extents, 230. S. C.

But not for business done in Dom. Proc. *Collingridge v. Odell*, 4 Price, 279.

If fraud appear evident, bill will be referred. *Hooper v. Till*, Doug. 199, and this though a warrant of attorney shall have been given for the amount. *Say. Costs*, 322. So, though the attorney had contracted with the client at a certain rate, besides expences. *Id.* 321. 2 Barnard. 164, *contra*.

It seems doubtful whether an attorney may agree to conduct a cause for a specific sum, besides his taxed costs. See *Guy, gent. one, &c. v. Gower*, 2 Marsh. 273. At all events, he must declare specially on the agreement. *Id. ib.*

The items of an attorney's bill, if it shall have been duly delivered, cannot be questioned before a jury. *Williams v. Frith*. *Hooper v. Till*, *Doug.* 198. And see *Bar.* 124. An old case seems *contra* the modern decisions, *Barnard*. K. B. 144, 5.

Where not questionable before a jury.

A copy of the bill is good in evidence, without notice to produce the original. *Anderson v. May*, 2 B. & P. 237.

Copy, evidence.

An attorney is not liable to the costs of taxing his bill under the statute, where the deduction of one-sixth is occasioned, not by the particular items being taxed, but by a whole branch of it being disallowed. *White v. Milnes*, 2 H. Bl. 357.

Liability to costs of taxation.

An executrix of an attorney held not liable to pay the costs of taxing her testator's bill, off which a sixth part is taken; the words of the stat. 2 G. II. c. 23. s. 23. imposes that liability upon the attorney only. *Say*. Costs, 327.

A replevin clerk partner with another attorney, must sue alone for the expences of preparing a replevin bond, though it be prepared at the office of the firm. *Brandon v. Hubbard*, 3 Brod. & Bing. 11.

Who must sue.

An attorney cannot recover a charge for conducting a suit in which the party charged has not had the benefit of the attorney's judgment and superintendence. *Hopkinson v. Smith*, 1 Bing. 13.

When cannot recover.

An attorney of C. B. suing in that court by privilege, may, on a verdict for a sum under 5*l.*, have, by reason of his privilege, judgment and execution for costs, notwithstanding the debt for which he sues is recoverable under the 47 G. III. c. 37. [Elloe and Kerton local act] which enacts, that if any action shall be commenced in any other court for a debt not exceeding 5*l.*, and recoverable by virtue of that act in the court of requests established thereby, the plaintiff, by reason of a verdict for him, shall not have any costs. *Johnson v. Bray*, 2 Brod. & Bing. 698.

Where privilege avails notwithstanding a local act.

As to action on attorney's bill, see also stat. 2 G. II. c. 23. s. 23, and 12 G. II. c. 13. s. 5.

Quare. Whether an attorney can maintain an action for business done under a commission of bankruptcy against the assignees one month after he has delivered a copy of his bill, but before it has been taxed by a master in Chancery? *Finchett v. How and Tarratt*, 2 Campb. R. N. P. 278; but it may be observed, that although the objection was taken, the plaintiff was allowed to recover, subject to an award for the amount.

As to action, &c. for bill.

And an attorney of the court of K. B. may sue out a commission of bankruptcy and maintain an action for his fees due upon that business without being admitted a solicitor in Chancery. *Wilkinson v. Diggell*, 1 B. & C. 158.

C. P. refused to stay proceedings in an action on an attorney's bill, brought subsequent to the order of a judge of K. B. for, but previous to, its taxation. *Steventon v. Watson*, 1 B. & P. 365.

And Exchequer would not stay the *postea* in the hands of the associate for the purpose of having an attorney's bill, upon which a verdict had been recovered, referred for taxation, and to be indorsed according to the *allocatur*, where the jury expressly found a verdict for the plaintiff for the amount of his bills, subject to taxation, and the application was discharged with costs. *Hewitt v. Ferneley*, 7 Price, 234.

An attachment was granted on the master's *allocatur*, for costs due from a plaintiff to his attorney, although the attorney was disqualified; the plaintiff having received the whole of the debt and costs from defendant. *Dimond v. Clark*, 1 *Chit. R.* 222.

So, a defendant settling a matter in dispute with the plaintiff, in the absence of his solicitor, after having been served with process, in the following manner, not admitting any thing to be due on account of the action, by introducing a memorandum into a receipt given by the plaintiff to defendant, on another account, that no further proceedings were to be had in the action, does not bind the plaintiff's attorney; but on shewing cause against the motion made for refunding the costs which had been levied by execution, he swore that the defendant admitted a knowledge of the notice of declaration before signing interlocutory judgment, and that defendant had told him that he had paid plaintiff a debt, but did not shew him the memorandum; that he then told the defendant, that unless the costs were paid, he should proceed in the action, and that he had therefore, on executing the writ of inquiry, taken nominal damages only. *Cole v. Bennett*, 6 *Price*, 203.

Where more than one-sixth part of an attorney's bill having been taken off on taxation, the defendant presented a petition to the Vice Chancellor to allow the costs of taxation; and pending this proceeding, the attorney brought his action for the residue of the bill: Held, that the action was well brought, the stat. 2 G. II. c. 23. s. 23, having only prohibited an action being brought pending the reference and taxation. *Hewitt, one, &c. v. Bellott*, 2 *B. & A.* 745.

In an action brought by an attorney, no bill having previously been delivered, a *bill of particulars* was demanded, which contained items taxable and not taxable: Held, that this was not the case of a bill delivered under the statute, and that the items not taxable were recoverable. *Mowbray, one, &c. v. Fleming*, 11 *East*, 285.

Interest on bill
not allowed.

Interest on an attorney's bill, after judgment affirmed, not allowed. *Walker v. Bayley* (in error), 2 *B. & P.* 219.

The court will not require the attendance of a third person before the prothonotary, in a taxation of a bill of costs, which had been referred to him to assist a Master in Chancery, to whom the reference had been previously given. *Protheroe v. Thomas*, 3 *J. B. Moore*, 3.

Where taxation
reviewed.

Where declaration charged more folios than it contained, and the charge allowed by the master, held ground for reviewing the taxation. *Morris v. Hunt*, 1 *Chit. R.* 544.

Negligence, no
defence.

Negligence (*Quare*, even extreme?) in the conduct of a cause, cannot be set up as a defence to an action on the attorney's bill. *Templer, one, &c. v. M'Lachlan*, 2 *N. R.* 136.

See sections IX. & X. *post*, *Practical Directions*, as to proceeding to tax an attorney's bill K. B., C. P.

VIII. PRACTICAL DIRECTIONS

As to Delivery of Attorney's Bill.

The statute abstracted, sect. i. ante, together with the above decisions in relation to the attorney's bill, have probably been looked over.

The mode of delivering a taxable bill, with the intention of suing for the amount, if not paid, is to take care that an exact copy of the bill be extracted from the book in which a fair entry of the office bills is usually made. This copy is therewith examined, and signed by the attorney; where there are partners, one may sign for and in the name of the firm.

Or, sometimes for greater convenience, two copies are extracted and examined, and both signed. A copy thus signed may be delivered; for unless a duplicate of the bill be kept, parol evidence of its contents cannot be given by the plaintiff without proving notice to produce the original. *Phillipson v. Chase*, 2 Campb. 110. Or left at the usual residence or place of business of the client. A note should be made, and signed by the person who may have delivered it of the fact; namely, as to whom, where, and when.

And where a bill signed has been regularly delivered, he may give a copy of it in evidence, without proof of notice to produce the original. *Peak*, 108. *Anderson, administrator, &c. v. May*, 2 B. & P. 237. 3 Esp. 167. S. C.

The bill may contain ordinary abbreviations. 12 G. II. c. 13. s. 6. *Reynolds, gent. v. I. Caswell*, 4 Taunt. 193. It may sometimes happen, that before the expiration of the month, it might be desirable to arrest the client for the amount; and although such a step may, at first sight, seem irregular, yet I have known it frequently done; but then, it must be apparent from the title of the declaration, and from evidence as to the time when the bill was delivered, that the month had not expired. It is usual therefore, to entitle the declaration specially, i. e. upon some day in the term subsequently to the expiration of the month. And see 2 Campb. 297. n.

The month is a lunar month. *Hurd v. Leach*, 5 Esp. 168. e. g. from the 1st day of the month, to the 28th day of the same month; reckoning one day inclusive, and the other exclusive.

IX. PRACTICAL DIRECTIONS

As to proceeding to tax an Attorney's Bill. K. B.

Two modes of proceeding to tax an attorney's bill, taxable, applicable to both courts, are in practice, viz. motion and summons; but summons is most usual.

The client either awaits, or is desirous to compel the formal delivery of the bill. If the bill be already delivered, the summons generally is to shew cause why the same should not be referred to the master to be taxed. If it be desired to compel delivery, the summons is generally to shew cause why the attorney should not deliver to the client, or his attorney, a bill signed, and why the same should not be referred, &c.

These summonses are obtained in the usual way (see tit. SUMMONS, post) at the judge's chambers; and on the return and attendance of the parties, the order for reference and taxation is made; but the client or his attorney must previously sign an undertaking at the judge's chambers to pay what shall be found due upon taxation.

On obtaining the order, an application is made at the master's office for an appointment. This is usually, though not necessarily, given upon the order, and a copy of which, and of the appointment thereon, is served on the attorney or agent.

If it be a bill of any magnitude, the master usually appoints some day or days out of term.

The parties attend, and the master sometimes requires certain items to be supported by affidavit, and also receives affidavits tending to falsify such items.

The master's allocatur being obtained, the party at whose instance the bill shall have been taxed, either pays the amount, or proceeds in or commences an action, conformably with circumstances, for its recovery.

Should the attorney have been overpaid, or should one-sixth part have been taxed off the bill, the attorney will be liable to refund the overplus, and to pay the costs of the taxation. Such payment may in either case be enforced by attachment; but previously to moving for the same, a rule nisi must be obtained.

In order to obtain this rule, the costs of such taxation must be taxed, and the allocatur personally served and demanded.

Where the attorney has been overpaid, the balance due from him will be noted upon the allocatur, and such sum must, in order to ground an attachment, be personally demanded.

Of the general facts an affidavit may be made, containing also a statement of service of the allocatur, and of demand and refusal of the money specified thereby.

The proceedings to obtain the attachment in this case are similar to others in cases of attachment for non-payment of money on the master's allocatur, which see, ante.

X. PRACTICAL DIRECTIONS

As to proceeding to tax an Attorney's Bill. C. P.

The proceedings in this court are the same as in K. B. mutatis mutandis; the prothonotary in C. P. being the proper officer in this court as the master or secondary is in K. B.

XI. Cases on Lien of the Attorney on Money recovered, and on Deeds and Papers for his Bill.

Courts differ as to the lien.

As to lien in K. B.

The decisions of the two courts, in relation to the attorney's lien are not in unison.

The legal demands of an attorney, by whose industry, and in many instances at whose expence, the fruits of a cause are obtained, must be satisfied; and agreeably to this principle laid down by Lord Mansfield, in *Welsh v. Hole*, Doug. 238. and recognized by Lord Kenyon, C. J. it was held, that where a defendant's attorney, after notice of his lien from the plaintiff's attorney, paid the debt and costs to the plaintiff himself, he should be personally liable to the plaintiff's attorney for the same, to the amount of the lien. *Read v. Dupper*, 6 T. R. 361. but a *bonâ fide* compromise without notice of lien will be good. *Id.*

So, as to money awarded, payment after notice from the attorney of his lien, subjects the party to pay it over again to the attorney. *Ormerod v. Tate*, 1 East, 463.

The lien extends to the judgment, and before it can be gotten rid of, the court will, on the application of the attorney, require that his bill be paid. *Mitchell v. Oldfield*, 4 T. R. 123. See however, *Pyne v. Jell*, 8 Id. 407. *Middleton v. Hill*, 1 M. & S. 240. And where the plaintiff after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record: Held, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. *Marr v. Smith*, 4 B. & A. 466.

Where defendant will be discharged notwithstanding the attorney's lien for costs.

Yet where the plaintiff's attorney directed the officer, who had arrested the defendant, not to let him go at large, without an express consent from him, the attorney, as he had a lien for his costs; and the officer did, by the authority of the plaintiff in the action, but without that of the attorney, let the defendant go at large: Held, that the sheriff was not liable to the attorney for his costs. *Martin v. Francis*, 2 B. & A. 402. 1 Chit. R. 222. On the application of the attorney for the plaintiff, the sheriff was directed to pay over to him the sum levied on execution against the defendant, notwithstanding the sheriff had notice to retain such sum, a docket being struck against the plaintiff. *Griffin v. Eyles*, 1 H. Bl. 122.

Where sheriff not liable to attorney's costs.

And where the plaintiff and defendant collusively settled an execution without notice to attorney, and he, instead of applying to the court, sued out a second execution for his costs, the same was set aside. *Graves v. Eades*, 1 Marsh. 113. 5 Taunt. 420. S. C.

But the lien is founded upon the general and final result of the cause, and therefore interlocutory costs between the parties may be set off, notwithstanding the attorney's lien. *Howell and others v. Harding*, 8 East, 362.

The court, on a summary application, would not allow the defendant to set off the costs recovered by him in another cause, before the plaintiff's attorney was satisfied. *Randle v. Fuller*, 6 T. R. 456.

A defendant being sued by bill as an attorney of this court, pleaded by an attorney who had not filed any warrant to defend, and on motion to stay the proceedings in the action (in which the plaintiff was nonsuited), plaintiff undertaking to set off the defendant's costs against a judgment debt due from him to the plaintiff: Held, that the defendant's attorney or agent had no lien upon the costs for his own costs in defending the suit. *Vansandau v. Burt*, 1 D. & R. 168.

But in this court, such lien of the attorney in relation to his costs, was held to be subject to the equitable claims between the parties in the cause, even though his client be insolvent. *Dennie v. Elliott and another*, 2 H. Bl. 587. and the cases there cited. *Emden v. Darley*, 1 N. R. 22. but see the opinion of Lord Eldon, on the practice of this court, in relation to this point, in *Hall v. Ody*, 2 B. & P. 28. and as the case of *Emden v. Darley* was ruled subsequently to the observation of Lord Eldon, it may seem that the two courts are settled in their respective opinions. And the same practice is recognized in a still later case. *Figes v. Adams*, 4 Taunt. 632.

As to lien in C. P.

An attorney has also a lien on his client's deeds and papers, until his bill be paid; recognized *arguendo* in *Wilkins v. Carmichael*, Doug. 104. by Mansfield, C. J. who said "That the practice was not very ancient, but that it was established on general principles of justice." See title Costs, *Sett off*, *post*.

But it has been decided in equity, that a solicitor's lien on papers is superseded by taking security. *Cowell v. Simpson*, 16 Ves. 275. See however, *Stevenson v. Blakelock*, gent. 1 M. & S. 535. where the general doctrine of the case in Chancery did not ap-

ATTORNEY; XII. CASES on *Liabilities, Privileges, &c.*

pear to be implicitly assented to in *K. B.* And although securities were taken in the present case, yet as they had been dishonoured, whereas in the case of *Cowell v. Simpson* they had time given, the cases were held not to clash, and the attorney's lien was allowed not to be gone; especially as the deeds, &c. which were detained by him, were deemed to have come to his hands in the way of his professional engagement on the part of his client.

But the lien which an attorney has on the papers in his hands, is only commensurate with the right which the party delivering the papers to him has therein. *Hollis v. Claridge*, 4 *Taunt.* 807.

And every one, whether attorney or not, has, by the common law, a lien on the specific deed or paper delivered to him, to do any work or business thereon, but not on other muniments of the same party, unless the person claiming the lien be an attorney or solicitor. *Id. ib.*

But an attorney has no lien on the commission, proceedings, or assignment, in a bankruptcy. *Ex parte Hardy*, 1 *Rose*, 395. and see *Ex parte Sandison*, *Id.* 275.

XII. Cases as to Attorney generally, his *Liabilities, Privileges, &c.*

Acts, &c. relating to attorney, strictly observed.

The acts of parliament, in relation to the qualifications of persons to be admitted and continued attorneys, are observed very strictly by the different courts.

Exceptions.

Cases depending upon very particular circumstances have occurred, where persons have been admitted or allowed to remain on the roll, *viz.* *Fletcher's case*, *Bl. Rep.* 734. *Carter's case*, *Id.* 957.

Fraudulent admission.

A person admitted an attorney by fraudulent collusion with his master, will be struck off the roll, and an attachment will be granted against the master. *Hill and Hargrave's case*, *Id.* 919.

Where not privileged to be present.

On an investigation of a charge of felony, before a justice of the peace, an attorney is only permitted to be present as a matter of courtesy; nor can he comment on the evidence, so as to apply the law to it, unless he be desired by such justice to give his opinion and advice on the case. *The King v. Barron*, 3 *B. & A.* 234. And see *Cox, gent. one, &c. v. Coleridge, esq.* and another, 6 *B. & A.* 37. *S. P.*

As to attorney's undertaking, warrant of attorney, &c.

If an attorney undertake in writing, to appear for any one, and do not, he may be compelled by summons or motion. *Lorymer v. Hollister*, 2 *Str.* 693.

Where authority was given to attorney to protect defendant from arrests, and before authority was countermanded, attorney gave undertaking to put in bail for defendant, the court would not set aside proceedings on behalf of defendant, though he disclaimed authority. *Buckler v. Roach*, 1 *Chit. R.* 193.

The court will set aside action brought without authority, for otherwise defendant would be twice charged. *Id. ib.*

The undertaking of the defendant's attorney, in order to procure his discharge, to put in good bail, or pay the debt, is not within the 23 *Hen. VI. c. 9.* because it is given to the plaintiff in the action, and not to the sheriff. *Rogers v. Reeves*, 1 *T. R.* 418. otherwise if given to the sheriff or bailiff. *Sedgeworth v. Spicer*, 4 *East*, 568.

And he is liable to an action on his recognizance of bail, though contrary to the rule of court that he should be bail at all; but he is nevertheless entitled to his privilege to be sued as an attorney. *Harper v. Tahourdin*, 1 *Chit. R.* 714. n.

Formerly it was necessary that an attorney should take a warrant from his client, but that measure being now obsolete notwithstanding several statutes requiring such warrants to be filed, further observation respecting it is unnecessary; the practice, however, of actually taking and filing the warrant of attorney, signed by the client, would save much inconvenience. See *Robson v. Eaton*, 1 *T. R.* 62. *

As to retainer.

Every attorney of C. P. must pay to the clerk of the warrants, 8d. a term. *Imp. C. P.* 98. And by a late case his right to stay the filing of the plaintiffs warrant of attorney until the termages in arrear from their attorney were paid was recognized. *Blackbourn v. Brown and Wife and others*, *T. 4 G. IV. C. P. MS.* and not only this right which was the immediate subject-matter of the rule obtained herein, was recognized, but also the right to stay all the business of the attorney, from whom fees were due as of antient right. Doubtless the case will be fully reported.

On change of attorney, a new warrant needs not be filed in C. P. *Wood v. Plant*, 1 *Taunt.* 44.

As to change of attorney.

But the plaintiff may sue out execution by a different attorney from the attorney in the cause, without obtaining an order of court for the changing the attorney. *Tipping v. Johnson*, 2 *B. & P.* 357.

A defendant having appeared to the action by one attorney, cannot in the same cause make any application to the court by another, without having obtained an order for changing his attorney. *Grinders v. Moore*, 1 *B. & C.* 654.

The court will not suffer the party to change his attorney without leave. *Kaye v. De Mattos*, *Bl. Rep.* 1323. *Macpherson v. Rorison*, *Doug.* 216. *acc. Hill v. Roe*, 2 *Marsh.* 257. and first paying the former attorney his bill. 12 *Mod.* 440. *Langley v. Stapleton*, *Bar.* 40. but a writ of error may be brought by an attorney without a judge's order for the change of attorney. *Batchelor v. Ellis*, 7 *T. R.* 337. or *scire facias*, *Hussey v. Welby*, *Say.* 218. And a party called on to shew cause may oppose the rule in person or by a new attorney, without notice to the other party of the order to change his attorney. *Lovegrove v. Dymond*, 4 *Taunt.* 669.

Notice of bail was given by the defendant's attorney, and bail above put in by an attorney employed by the bail to the sheriff, without any order having been made to change the attorney. Held, that this was sufficient. *The King v. London (Sheriffs)*, 2 *B. & A.* 604.

Keeping a plea filed by a new attorney without an order for charge is waiver of such order. *Margerem v. Mukilwaine*, 2 *N. R.* 509.

* On a late motion, *ex parte A.* against *B.* a most respectable attorney, *Trin. 1 G. IV.* for a rule to shew cause why he personally should not pay *A.* the costs of an ejectment, in which he had lately recovered a cottage, upon the alleged ground of *B.*'s having defended the ejectment, without retainer from the defendant; the motion would have

succeeded in toto, had not *B.* established the fact of retainer at the instance of the defendant. But although the rule was finally discharged, *B.*'s omission to take a formal warrant, subjected him to the payment of his own costs. *MS.* See *Doe, d. Thwaites v. Roe*, 3 *D. & R.* 226. *S. C.*

ATTORNEY; XII. CASES on Liabilities, Privileges, &c.

In the Exchequer it seems that notice is not taken of the immediate attorney in the cause; proceedings there being in the name of the clerks in court. *Hopkins v. Peacock*, 5 Price, 558.

If the attorney die, a new attorney cannot proceed in the cause without giving notice of his appointment to the opposite party. *Ryland v. Noakes*, 1 Taunt. 342.

Liability under
courts of con-
science acts.

An attorney is not liable to be sued in the court of conscience in Middlesex. *Wiltshire v. Lloyd*, Doug. 381. nor to any other court of conscience, unless expressly included in the act constituting such court. See *Johnson v. Bray*, 5 J. B. Moore, 622. The Westminster Act, 25 G. II. c. 42. s. 1.; the Tower Hamlets, 19 G. III. c. 68. s. 24; and the London Acts, 39 & 40 G. III. c. 104, and several later ones make the attorney amenable to those courts.

Barrister re-
admitted an at-
torney.

A barrister, previously an attorney, cannot be again put upon the roll; he must be first *disbarred*. *Ex parte Cole*, Doug. 114.

Where attorney
re-admitted.

An attorney struck off the roll may be re-admitted; in some cases, it being intended in the light of a suspension only. *The King v. Greenwood*, Bl. Rep. 222. 1 B. & A. 522 S. C.

Where an attorney who had been struck off the roll on a conviction for seditious practices, and was afterwards pardoned, he was not allowed to be restored to the roll on the ground of want of experience. *Ex parte Frost*, 1 Chit. R. 558. n. See further tit. CERTIFICATE, *Attorney's Certificate*, post.

In what cases
courts exercise
summary juris-
diction over at-
torney.

Where the employment of an attorney is so connected with his professional character as to afford a presumption that his being employed was in consequence of his bearing that character, the court will interfere in a summary way to compel him faithfully to execute the trust reposed in him: and therefore, where an attorney was employed by A. to collect and get in the effects due to him as administrator of another person, the court compelled the attorney to render an account to the executors of A. of the monies, &c. received by him, although he had never been employed by A. or his executors to conduct any suit at law or in equity on his or their behalf. In the matter of the executors of Aitkin, deceased, 4 B. & A. 47. And see, In the matter of Knight, 1 Bing. 91. S. P.

So the court under circumstances will entertain a summary jurisdiction over an attorney of the same court, in striking him off the roll on conviction for conspiracy. *Anon.* 1 Chit. R. 357. n.

But the court will not call upon an attorney summarily to answer the matters of an affidavit, charging him with an indictable offence, but will leave the parties complaining to their prosecution for the offence. *Short v. Pratt*, 1 Bing. 102. And see in the matter of Knight and Hall, *Id.* 142.

An attorney entering a plaint and suing out process in the county court, during the time of his imprisonment, is within the meaning of 12 G. II. c. 13. s. 9. and liable to be struck off the roll. In the matter of Abraham Flint, gent. one, &c. 1 B. & C. 254. 2 D. & R. 406. S. C.

An attorney engaged a certificated conveyancer to conduct his business, and agreed to allow him a moiety of the profit instead of a salary. The names of both were painted on the office door, and

bills for business were made out and delivered in their joint names: Held, that this was a case within 22 G. II. c. 46. s. 11. inasmuch as the attorney had allowed his name to be used for and on account of an unqualified person; and the court ordered the attorney to be struck off the roll, and the clerk to be committed to prison for a month. In the matter of Jackson and Wood, 1 B. & C. 270. In the matter of Clarke, Isaacson, and Brookes. 3 D. & R. 260; and Re Jaques, 2 D. & R. 64. And see the statute, page 117, *ante*.

And if an attorney be struck off the roll K. B. for misconduct, C. P. will make a similar order on motion founded on a copy of the original report of the master K. B. In re Smith, 4 J. B. Moore, 319.

If an attorney of C. P. do any thing wrong *quatenus* attorney in an inferior court, that court will oblige him to answer the complaint. Evans v. P——, 2 Wils. 382.

Quære whether an attorney who keeps out of the way in order to avoid personal service of an *allocatur* is fitting to remain on the roll? In Re —, gent. 1 D. & R. 529.

The court will not, on the last day of term, stay proceedings, nor quash a rule *nisi* for an attorney to answer the matters of an affidavit, or hear cause shewn against such latter motion. Bailey v. Jones, 1 Chit. R. 744.

And the court will also exercise a summary jurisdiction in obliging him to deliver up deeds, &c. on satisfaction of his lien, though they came into his hands as steward of a court and receiver of rents. Hughes v. Mayre, 3 T. R. 275. 1 Chit. R. 95. *acc.* and will order an attorney who had refused, on the ground of misconduct, to take back an apprentice who had run away from his service, to return to the parents of such apprentice, a reasonable part of the premium received with him. *Ex parte* Pranker, 3 B. & A. 257. But where an attorney has in his custody the muniments of two co-defendants, and sues one of them for his bill, the court will not, at the instance of the one sued, refer it to the prothonotary to ascertain which of such muniments the attorney shall deliver over to him for paying the debt and costs. Duncan, gent. v. Richmond, 7 Taunt. 391. S. C. 1 J. B. Moore, 99. *Ex parte* Grubb, esq. 5 Taunt. 206. And where employed as steward of a manor, the court will compel him to deliver up court rolls and muniments of his employer. *Ex parte* C. C. C. Oxford, 6 Id. 105. And also it seems will compel him to pay over rents received. *Id. ib.* But not interest. *Id. ib. semble*; but where there was no cause in court, nor any criminal conduct imputable to the attorney, the court refused to order him to deliver up a lease in his possession on payment of his demand. In the matter of Lowe, 8 East, 237. a similar point determined in Cocks v. Harman, 2 Sm. R. 409. So also where the attorney was a trustee named in the deed, the court refused to order him to deliver it up. Pearson v. Sutton, 5 Taunt. 364. So also in case of his negligence in not completing a fine. See tit. FINE, sec. III. *post*, or Stone v. Stone, 4 Taunt. 601. Gruggen v. White, *Id. ib.* 881. So also for negligence in the discharge of his professional duty if there be no fraud; and therefore where an attorney who was retained to defend an action, allowed judgment

to go by default, and afterwards desired his client not to attend to endeavour to mitigate damages, because the proceedings might be set aside for irregularity, when in fact they could not, and on the event execution was sued out, and the client paid the sum claimed and costs: Held, that the only remedy against the attorney was by action. In re Wm. Jones, 1 *Chit. R.* 651 and 186. So if money be paid to an attorney for the purpose of levying a fine, and he neglect to do so, whereby the party is put to the expence of levying another, C. P. will not order such sum to be repaid by the attorney, as his bill might have been taxed when it was discovered that the fine had not passed, and they left the party to his remedy by action. In re Lawrence, 2 *J. B. Moore*, 665. The court directed an attachment to be executed against an attorney for negligence. *The King v. Tew, Say.* 50. in *Mordecai v. Solomon*, an attorney was ruled to pay the costs of a *non pros* incurred by his negligence. *The King v. Tew, Say.* 172. See however further Crossley's case, 6 *T. R.* 701.

The court, it seems, will not call upon an attorney to shew by whose authority he pleads a dilatory plea. 3 *D. & R.* 233. And *Richley v. Proone* is over-ruled. *Id. ib.* And see *Merrington v. C. Beckett, Id.* 231. 2 *B. & C.* 81. S. C.

The court granted a peremptory rule for attorney concerned in shewing cause against a *mandamus* to file his affidavits on the morrow, the rule for the *mandamus* having been made absolute. *The King v. Middlesex Justices, 1 Chit. R.* 369.

If an attorney swear in exculpation to an *incredible* story, though he deny the matters charged, an attachment will be issued. In the matter of Crossley and others, attorneys, 6 *T. R.* 701.

An attorney making an affidavit to support a motion for setting aside an outlawry against a defendant, must shew that he is authorized to act for the defendant. *Bowlett v. Waters, esq. 3 D. & R.* 55.

After verdict the C. P. refused to compel an attorney to discover his client's place of abode. *Hooper v. Harcourt, 1 H. Bl.* 534.

An attorney was ordered to pay costs, as well as his client, for making himself personal in a frivolous complaint. *The King v. Fielding, esq. 2 Burr.* 654. See also *Clarke and Another, executors of Lennard v. Gorman, 3 Taunt.* 492, and whenever the court discharge a rule obtained on suggestions perfectly groundless, they directed it to be understood they would in future order the attorney to pay the costs. *Rolfe v. Rogers, Rogers v. Burgess, 4 Id.* 191. See also where an attorney was made to defray the expence of a new fine; the former fine having been delayed through his laches. 5 *Id.* 365.

So held liable to pay costs of sham pleas, though instructed by his client so to plead. *Vincent v. Groome, 1 Chit. R.* 182.

Plaintiff's attorney compelled to refund costs of bill of Middlesex, it appearing that no precept or warrant to prosecute was filed in office, and also attached for not answering affidavit relating thereto. *Id.* 186, and see 631.

But where the prothonotary refused to allow costs on account of gross misconduct on the part of the plaintiff's attorney, the court

When liable to pay costs on summary applications.

refused a rule for the prothonotary to review his taxation, though the defendant had stayed proceedings under a rule for staying them on payment of debt and costs. *Adams v. Staton*, 1 *Bing.* 69. In this case the defendant paid part of the money, and an appointment was made to pay the remainder the following day; the defendant called a little after the time, and the plaintiff's attorney refused to see him, and he was told to call the next day. He did call and found three writs issued. It was the amount of the costs upon three writs, which the prothonotary refused to allow. The court intimated that such conduct of the attorney might in future be visited in a different way.

Where action or other proceeding lies for negligence, an action lies against an attorney for *crassa negligentia*, gross negligence, but the court will not proceed against him in a summary way. *Pitt v. Yelden*, 4 *Burr.* 2. 60. See, however, *Say. Rep.* 50. 172. As to liability by action, &c.

And where he suffered a cause to be called on for trial, without having ascertained whether a material witness, whom the plaintiff had undertaken to bring into court had arrived, in consequence of which he was nonsuited: held, that in an action against such attorney for negligence, it was rightly left to the jury to determine whether he had used reasonable care in conducting the cause, and they having found that he had not, the court refused to disturb the verdict. *Reece v. Rigby*, 4 *B. & A.* 202.

And where the solicitors of the assignees of a bankrupt tenant, on whose lands a distress had been levied by the landlord, gave a written undertaking in the following terms: "We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained;" the solicitors were held personally liable. *Burrell v. Jones*, 3 *B. & A.* 47.

So where the attorneys for the plaintiff and defendant in a cause which was ready for trial, entered into an agreement whereby they *personally* undertook that the record should be withdrawn, and certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a certain manner: Held, that the attorney for the plaintiff was personally bound to pay the costs, when taxed, in the mode specified. *Iveson, gent. one, &c. v. Conington, gent. one, &c.* 1 *B. & C.* 160. 2 *D. & R.* 307. *S. C.*

Where *C. D.* the attorney of *E.* employed *A. B.* the attorney of *F.* to do certain business of which *A. B.* knew *E.* was to have the benefit, and *A. B.* brought his action against *C. D.* for the amount of such business: Held, that it was rightly left to the jury to say, whether the credit were properly given to the defendant, and the jury having found that it was, *C. D.* was held liable. *Scrace, gent. one, &c. v. Whittington, gent. one, &c.* 2 *B. & C.* 11. 3 *D. & R.* 195. *S. C.*

Formerly it was held, *i. e.* in one case, that a solicitor in Chancery might practice on the equity side of the Exchequer, without being admitted a solicitor in that court. *Meddowcroft v. Holbrooke*, 1 *H. Bl.* 50. But this case has not been recognised, since it has been ruled that a solicitor on the equity side of the court of Exchequer is not entitled; therefore, to practice in

Solicitor may practise on equity side of Exchequer?

the court of Chancery: nor if he did practice there can he maintain an action for his bill. *Vincent v. Holt*, 4 *Taunt.* 452. And *semble* that a solicitor of the court of Chancery cannot by consent in writing, authorize a solicitor of the court of Exchequer, to practice in the court of Chancery in the name of the solicitor of that court. *Id. ib.*

Chambre, J. observing upon the stat. [2 G. II. c. 23. s. 10.] said, "I believe the statute has been very little acted upon. It requires a consent in writing, which is scarcely ever given. But the question is, whether the case [*Meddowcroft v. Holbrooke*, 1 *H. Bl.* 50.] or the statute shall be set aside." 4 *Taunt.* 455.

An attorney prosecuting a suit in the *Sheriff's Court by justices*, though for more than 40s., is not liable to the penalty on 25 G. III. c. 8, for practising without a certificate. *Cross v. Kaye*, 6 *T. R.* 663.

Where attorney
may prosecute
suit without cer-
tificate.

A common informer, although no authority is given by that statute, may recover penalties for not entering certificate according to 27 G. III. c. 90. s. 26, stat. 25 G. III. c. 80, giving the power, and that statute being considered *pari materia*. *Davis v. Edmonds*, in error, 3 *B. & P.* 382.

Where informer
may sue for pe-
nalties.

An attorney cannot be struck off the roll on his own motion, though he has never practised without an affidavit that no proceedings are pending against him for misconduct. *Anon.* 1 *Chit. R.* 557. n.

Attorney struck
off the roll at his
own request.

The privileges of an attorney only continue while he is a practising attorney. Rule 1654, and while he has the certificate required by 25 G. III. c. 80. *Brooke v. Bryant*, 7 *T. R.* 25. *Dyson v. Birch*, 1 *B. & P.* 4. He does not lose his privilege by neglecting to renew his certificate at the expiration of his former one, if he renew it within the space of one year. *Skirrow v. Tagg*, 5 *M. & S.* 281.

As to privileges,
&c.

The practiser will do well to remark a distinction in the two courts in relation to attorneys becoming bail.

It will be seen by the rules *M. 6 G. II. C. P.*, *M. 14 G. II. K. B. ubi supra*, that an attorney nor his clerk cannot be bail; and when bail, may be treated as a nullity. *Ritchie v. Gilbert*, cited 1 *Taunt.* 164. See also as to the clerk whether articulated or not. *Cakish v. Ross*, cited *Ib.* but where bail had been added to the attorney, and he had been permitted to justify unopposed, the court C. P. would not vacate the allowance. *Bell v. Gate*, *Id.* 162; and where in K. B. the attorney is put in as bail, the plaintiff must except, and cannot treat the bail as a nullity. *The King v. The Sheriff of Surrey*, 2 *East*, 181. S. P. as to attorney's clerk. *Foxall v. Bowerman*, *Ib.*

He is not compellable to serve as a constable. *Prouse's case*, mentioned *Doug.* 538.

If an attorney sue as a common person, C. P. will give the defendant leave to plead that the cause of action arose within the jurisdiction of the court of requests, together with other matters. *Tegg v. Madan*, 1 *B. & P.* 629.

So that where he sues as a common person, if he recover less than 40s., and the defendant reside in Middlesex, a suggestion may

be entered under the Middlesex County Court Act, 25 G. III. c. 33.

s. 19. *Parker v. Vaughan*, 2 B. & P. 29.

This privilege shall not avail in a proceeding on foreign attachment in London, where he is garnishee; *aliter* as real defendant. *Ridge v. Hardcastle*, 8 T. R. 417.

Nor if he be defendant at the king's suit. 2 Rol. Abr. 274.

But if sued by original for an act done by him as a magistrate, he may plead his privilege in abatement. *Duffy v. Oakes*, 3 Taunt. 166.

Actions on statutes at the suit of informers are not considered to be within the last-mentioned authority. *Button v. Teasdale*, Bar. 48.

If a man hath a joint cause of action against two, one an attorney and the other not, he must (may) arrest both. *Brenthwaite v. Blackerby*, 2 Salk. 544. *Roll. Ab.* 274. *Pratt v. Salt*, 4 Bac. Abr. 227.

So where he sues in *auter droit* as executor, &c. *Newton v. Rowland*, *Ld. Raym.* 533. and cases there cited, or where he joins or is joined in any act with another. *Molyn v. Cook*, 1 Vent. 298. *Powle's Case*, *Dyer*, 377.

As in the case of baron and feme. *Drew and Wife v. Rose*, *Ld. Raym.* 1398. *Robarts and Another v. Mason and Wife*, 1 Taunt. 254.

Appearance waives objection to privilege. *Wade v. Wadman*, gent. one, &c. Bar. 167. *Quære*, If cause of demurrer? S. C.

Privilege may be waived by not claiming it in proper time, *Crossly v. Shaw*, 2 Bl. Rep. 1088. Where attorney took out his certificate on 25th November, was arrested in beginning of January, put in bail above, and did not apply to court to avail himself of his privilege till 3d February. Application held too late. *Bernard v. Winnington*, 1 Chit. R. 188.

If he sue by original he loses his privilege. *Hetherington*, one, &c. v. *Lowth*, 2 Str. 1037.

In K. B. if attorney of that court be arrested on latitat, a motion to discharge him out of custody on filing common bail is of course. *Wheeler's Case*, 1 Wils. 298. 306; but an attorney or officer of a different court must find special bail, and plead his privilege in abatement. *Snee v. Humphreys*, *Id.* 306. See also *Crossley v. Shaw*, 2 Bl. R. 1085. 1088. where it was held that an attorney arrested by *capias*, on a special original out of the same court, is not entitled to his discharge by serving the sheriff with a writ of privilege, but must plead it *sub pede sigilli*.

But where both parties are attornies of the same court, the defendant arrested will be discharged on a summary application. *Nichols*, one, &c. v. *Earle*, one, &c. 8 T. R. 395; but without costs. *Barber*, one, &c. v. *Palmer*, one, &c. 6 *Id.* 524.

Yet an attorney of any court may be discharged on motion on filing common bail. 1 Chit. R. 188. (n.)

On such a motion the affidavit must state that he had practised within a year. *Dyson v. Bird*, 1 B. & P. 4. *Quære* whether he should not also state that he had taken out his certificate?

An attorney in custody for debt loses his privilege, and may be detained on *mesne process*. *Byles v. Wilton*, gent. one, &c. 4 B. & A. 88.

And where an attorney, after he had been attending a cause, went with his witnesses to a coffee-house, where he was arrested three hours after the rising of the court, on an attachment for non-payment of money, it was held that he was properly taken. *The King v. Priddle*, 1 *Tidd*, 222; who also refers to 1 *Smith R.* 355.

A solicitor arrested on his way from his residence to Lincoln's-Inn Hall, without deviation, for the purpose of attending a bankrupt petition, as solicitor, discharged on personal examination by the Lord Chancellor. *Castle's Case*, 16 *Ves.* 412.

If an attorney be arrested in an inferior court, it seems he may issue his writ of privilege. For the Form, see No. 4. *post*, p. 151. Before signing, obtain certificate at the Master's office, K. B. at the clerk of the warrants, C. P., that he is an attorney. Pay signing nothing; sealing, 7*d.* to be lodged with the clerk of the papers of the inferior court; and being allowed, of course, the judge of that court discharges the defendant. If the defendant be an attorney of the K. B. and shall be arrested in C. P. there seemed much difficulty in obtaining information at the respective offices, as to where the writ of privilege when sued out should be lodged. *Quære* the sheriff?

In the case upon which these enquiries was made, the privilege had been pleaded in due time, but not with the writ annexed. *Quære*, therefore, as to the whole of this practice?

But where an attorney is sued in his own court by improper process, as *latitat*, original, &c. he pleads his privilege in abatement of the writ. So also where he is sued out of his own court, he pleads in abatement; but then it is considered as a plea to the jurisdiction. See *Comerford v. Price*, *Doug.* 312. Also 2 *Saund.* 209. n. [d.] n. [e.]

As to evidence
by attorney.

An attorney cannot be permitted to give evidence of facts communicated to him by his client, as instructions for conducting his suit. *Wilson v. Rastall*, 4 *T. R.* 753. or as to the facts in relation to a deed where he was concerned for both parties. *Robson v. Kemp*, *Esp. N. P. R.* 235. but a *gratis dictum* of the client respecting a suit already terminated may be disclosed. *Cobden v. Kendrick*, 4 *T. R.* 431.

Of collateral facts he may give evidence. *Doe v. Andrews*, *Corp.* 846. and, indeed, of any fact within his own knowledge. *Ib.* Lord Say & Sele's case, *Bull. N. P.* 284. See also the next case.

An attorney had notice to produce a certain paper in the hands of his client, and he was held bound to give evidence of the contents of the notice. *Spenceley, q. t. v. Schulenburg*, 7 *East*, 357.

A proposition made by an attorney in conversation not proved to be authorised by, may not bind his client. *Wilson v. Turner*, 1 *Taunt.* 398. See *tit. MOTION, post.*

XIII. Rules and Cases as to Proceedings by Attorney Plaintiff, generally.

How attorneys
may sue.

Attornies may in all cases sue by a particular process, called "Attachment of Privilege."

Rules as to suing out the same. K. B. and C. P.

By *R. G. H. 20 G. II.* it is ordered that every attorney of this court who shall sue out any attachment of privilege, shall leave a precipe with the signer of the writs with the defendants names, not exceeding four in each writ, with the return and day of signing such writ, with the agent's or attorney's name who sued out the same; and all such precipes shall be entered on the roll where the precipes of latitats and all writs issued out of this court are entered, and the officer that signs the writ in this court shall not sign such attachment till a precipe be left with him for that purpose.

Rule K. B.

By *R. G. H. 11 G. II.* the same direction as to the attachment of privilege is given, and by *R. G. T. 9 W. III.* no attachment of privilege is to be sealed without being first stamped or signed by the clerk of the warrants.

Rule C. P.

If attachment issue without precipe being so left or signed by the clerk of the warrants as above, it will be set aside with costs. *Frogatt v. Tapscot, 2 Bl. Rep. 919.*

Cases thereon.

In C. P. the attachment must have fifteen days between the teste and return. *Haward, one, &c. v. Denison, Bar. 410.*

Teste and return.
C. P.

If the attachment be not bailable, a copy may be served with notice to appear as in other cases, and the day to appear must be in words at length. *Pinero, gent. one, &c. v. Hudson, 1 M. & S. 119.*

Where bailable.

If it be bailable, the sum sworn to must be indorsed on the writ, and also the date of suing out, but the attorney's name need not be indorsed, the statute applying to writs sued by him for another person. *Fields, one, &c. v. Lewen, 4 T. R. 275.*

Where not.

The *ac etiam* needs not be inserted; attachment of privilege being excepted. *13 Car. II. stat. 2. c. 2. Callaghan, one, &c. v. Harris, 2 Wils. 392.* a note; but it is usual to insert it.

Ac etiam need not
be inserted.

It is but a latitat and not an original. *Rudd v. Birkenhead, 1 Show. 367.* but it may be pleaded to without continuances till declaration. *Ib. Finch v. Wilson, one, &c. In error. 1 Wils. 167. See contra, 2 Sel. 10.*

Not an original
writ.

If an attorney deliver his declaration four days exclusively before the end of the term in which attachment is returnable, and enter a rule to plead, and demand a plea, the defendant must plead as of that term; if plaintiff deliver declaration within that time, defendant is entitled to an imparlance; and if not delivered before the essoign day of the subsequent term, the defendant is entitled to an imparlance to the term next following that. *2 Sel. 11.*

When to plead.

An attorney, when plaintiff, may lay his venue in Middlesex; but when defendant, he has no privilege to change the venue to Middlesex. *Yeardley v. Roe, 3 T. R. 573.*

As to venue.

If plaintiff, an attorney, lay his venue in a Welch county, a suggestion that he is within the Welch Judicature Act, may be entered of record. *Evans, one, &c. v. Jones, 6 T. R. 500.*

Venue in Welch
county.

An attorney plaintiff cannot hold an attorney defendant to bail on an attachment of privilege; abatement may be pleaded, or the court will discharge defendant in such a case, but without costs of motion. *Barber v. Palmer, 6 T. R. 524. Nichols v. Earle, 8 Id. 395.*

Cannot be held
to bail on attach-
ment of privilege.

May sue by common process and declare, &c.

When, though prisoner, he may notwithstanding act, &c.

Subsequent proceedings same as in other cases.

What proof he must adduce in action for defamation.

Case as to suing for under 5*l.* in London.

Court first possessed retains privilege.

An attorney plaintiff may sue by common process, and indorse his own name on the copy as the attorney, and may afterwards declare by another attorney. *Jackson v. Barnard*, 7 *T. R.* 35.

He may, though in prison, sue by attachment of privilege for a debt of his own, notwithstanding the stat. 12 *G. II. c. 13, s. 13*. *Kaye*, one, &c. *v. Denew*, *ibid.* 671. And though his certificate have expired, and not been renewed, if it be within a year from the expiration of his certificate, and although he has been in prison for above a year before the suing out of the writ. *Prior v. Moore*, 2 *M. & S.* 605.

The subsequent proceedings at the suit of an attorney as one, are the same as in other cases, and in the writs of enquiry or execution he is to be described as in the declaration.

In an action for defaming him in his profession, proof that he acted as an attorney is sufficient. *Berryman*, one, &c. *v. Wise*, 4 *T. R.* 366.

Attorney plaintiff shall not be compelled, though the debt do not amount to 5*l.*, to prosecute his suit under the London Court of Conscience Act. *Board v. Parker*, 7 *East*, 47.

Where an attorney of one court sues an attorney of another, the court first possessed of the cause shall retain its jurisdiction. *Guy v. Reynell*, 2 *Brownl.* 266. *Danser*, one, &c. *v. Berryman*, 2 *Bl. Rep.* 1325.

XIV. PRACTICAL DIRECTIONS

As to Actions by Attorney, as such, Plaintiff. K. B.

Get blank attachment of privilege at the stationer's, which fill up; stamp 5*s.* FORM, No. 2.

A precept should then be made. FORM, No. 1.

Carry writ and precept to the signer of the writs, who will sign writ gratis, then get same sealed.

When not bailable, a copy may be served, with the English notice subjoined, as in other cases.

On appearance of the defendant, the declaration is to be engrossed on a 4*d.* stamp; it will be found to vary from common cases somewhat in the beginning. FORM, No. 3.

Proceed as in other cases.

XV. FORMS

In Action by Attorney, as such. K. B.

No. 1.
Precept for attachment of privilege.

Middlesex. Attachment of privilege for *J. D.* gentleman, one, &c. against *R. R.* case for £—— upon promises, returnable on ——.

Oath, for £——.

No. 2.
Attachment of privilege.

George the Fourth, &c. To the sheriff of *Middlesex*, greeting: We command you that you attach *R. R.* if he be found in your bailiwick, and him safely keep, so that you have his body before us at *Westminster*, on —— next after ——, to answer *J. D.* gentleman, one of the attornies of our court, before us, according to the liberties and privileges of such attornies and other ministers of the same court, from time whereof the memory of man is not to the contrary, used and approved of in the same, of a plea of trespass, and also to

a bill of the said J. D. to be exhibited against the said R. R. for £—— upon promises, according to the custom of our court before us, and that you have there then this writ.

Witness, Sir Charles Abbott, Knt. at Westminster, the —— day of ——, in the —— year of our reign.

ELLENBOROUGH and MARKHAM.

J. D. in person. [Date.]

Bail for £ —— by affidavit filed.

N. B. If the writ be not bailable, leave out the words in italic.

Middlesex, to wit. J. D. gentleman, one of the attornies of the court of our lord the king, before the king himself, being according to the liberties and privileges of the same court used and approved of in the same from time whereof the memory of man is not to the contrary, present here in court in his own proper person, complains of R. R. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, FOR THAT WHEREAS (as in other cases, add pledges at the end.)

No. 3.
Beginning and
end of declara-
tion by attorney.

XVI. Cases in Actions against Attorney. K. B.

The attorney can only be sued by bill, the form of which, as varying in the beginning from a common declaration, will be seen below. Comerford v. Price, Doug. 312.

An attorney who is a justice of the peace for a borough, if sued by original for an act done in his office as a magistrate, may plead his privilege in abatement. Duffy v. Oakes, 3 Taunt. 166.

And being sued by bill jointly with a person having privilege of parliament, does not lose his privilege. Ramsbottom and others v. Harcourt and another, 4 M. & S. 585.

Four days time for pleading only in all cases in this court, country as well as town, is allowed. Mann v. Fletcher, one, &c. 5 T. R. 369. And see page 147, ante.

The defendant is to be charged for his own entries only.

The bill may be filed in vacation, and he must pay the costs. Wagborne v. Fields, one, &c. 5 T. R. 173. Comerford v. Price, Doug. 313. and though filed in the vacation, the day of filing it may be specially inserted in the memorandum. Dodsworth v. Bowen, 5 T. R. 325.

Charge for en-
tries.
When bill may be
filed.

An attorney, sued by original, pleaded the custom of this court to be, that no attorney thereof had been compelled to answer to an original writ, then went on to state *unless he had been first fore-judged from his office*; this being the custom of the Common Pleas, was improperly introduced, but held, that though added unnecessarily, the plea was not thereby vitiated. Stokes v. Mason, 9 East, 424.

When sued by
original.

An attorney in custody under an attachment is not bailable by the sheriff, 1 Str. 479; but he is bailable before a judge. *Id. ib.*

Where cannot be
bailed by the she-
riff.

On motion for an attachment against an attorney, a full and clear affidavit of facts as in other cases, will be necessary.

The court will not, on the last day of term, stay proceedings, nor grant a rule nisi for an attorney to answer the matters of an

ATTORNEY; XVII. PR. DI. K. B.; XVIII. FORMS, K. B.

affidavit, or hear cause shewn against such latter motion. *Baily v. Jones*, 1 *Chit. R.* 744. See tit. INTERROGATORIES, *post*.

See sect. xii. *ante*, Abstract of decisions as to liabilities, privileges, &c.

XVII. PRACTICAL DIRECTIONS

As to Action against Attorney. K. B.

Engross bill on parchment; stamp 4d.; and it seems the engrossment of the bill, as well as of the copy, must be fair and without obliterations of printed counts, Hartop v. Jukes, one, &c. 1 M. & S. 709. File with the clerk of the declarations; the 5s. stamped memorandum or minute of retainer, &c. being previously annexed.

A copy of the bill on paper, 4d. stamp, fairly engrossed as mentioned above, must then be delivered at the defendant's dwelling or office of business or at that of his known agent; but who may refuse to receive it.

If the bill has been filed four days, exclusively, before the end of the term, the notice to be indorsed must be to plead in four days; if it be filed after that time, the defendant will be entitled to an imparlance, and he need not plead till within the first four days of the next term.

Note. Only four days to plead are allowed in this court, whether town or country, as before mentioned in the general observations.

Give rule to plead; and demand plea, as in common cases.

In short titling the cause, it is usual to add after the plaintiff's or defendant's name, being an attorney, "Gent, one, &c."

Where sued irregularly.

As to proceeding on the part of an attorney defendant, where sued irregularly, see page 145, ante.

If defendant plead, issue as in other cases.

For other matters, see titles ATTACHMENT, FOR CONTEMPT, ante; INTERROGATORIES, post.

XVIII. FORMS.

In Action against Attorney. K. B.

Ellenborough and Markham.

No. 1.
Beginning and
conclusion of bill.

— term, in the — year of the reign of King George the Fourth.

Middlesex, to wit. J. D. complains of R. R. gentleman, one of the attornies of the court of our lord the now king, before the king himself, being present here in court, in his own person; FOR THAT WHEREAS (as in other cases) and therefore he brings his suit, &c. [Beer v. Alleyn, Andrs. 247.] pledges, &c.

—, Attorney for the plaintiff.

Defendant in person.

In the King's Bench.

No. 2.
Form of special
memorandum
when bill filed
in vacation.

— term (*the term prior to filing the bill.*)

Be it remembered, that on the — day of —, in the — year of the reign of our lord the now king, (*the day the bill was filed, and after the cause of action accrued*) — brought into the office of the clerk of the declarations of this court, according to the course and practice of the court, his certain bill against —, gentleman, one of the attornies of this court, and filed the same bill

as of ——— term, in the ——— year of the reign of our said lord the king, which said bill follows in these words, to wit (*as in other cases*).

*Indorse on the copy to be delivered to the defendant thus:—*This is a true copy of a bill filed against you, as of this present ——— term, and unless you plead thereto in four days from the date hereof, (*if filed in vacation, say “within the first four days of next ——— term”*) judgment will be signed against you by default.

No charge for the copy.

George, &c. To the judges of our court of our palace of Westminster, and to every of them, greeting: Whereas, according to the custom of our court, before us at Westminster, hitherto used and approved of in the same: the attornies of the court before us, whilst they are prosecuting or defending suits and actions therein for their clients, ought not, nor have they, from time immemorial been used to be compelled to answer before any of our justices or officers, or any other secular judges whatever, upon any pleas, complaints or demands, which do not particularly relate to us, (pleas of freehold, felonies, and appeals excepted) save only before us by bill exhibited in our said court before us, and not by writ: And whereas we have lately received information by the complaint of *J. D.* gentleman, one of the attornies of our said court, before us, that several ill-disposed persons, intending to disquiet the said *J. D.* having issued forth and prosecuted out of our court of our palace at Westminster, one or more writ or writs, returnable before you in the same court, or one or more precept or precepts, returnable in our said court before you, or one of you, against the said *J. D.*, and threaten to arrest and detain him in your custody thereupon in suits which do not relate to us, or pleas of freehold, felonies, or appeals, whereby the said *J. D.* is unable to attend his said office as an attorney upon several affairs and suits depending in our said court before us, which, if it be permitted, will manifestly take away, and be not only in derogation and diminution of the jurisdiction of our said court before us, and the liberties and privileges thereof, but also to the great detriment of the said *J. D.* and his clients; and because we are willing that the jurisdictions, privileges, and customs for so long time used and approved in the said court before us, should be inviolably kept and observed, we command you and every of you, that you desist from taking the said *J. D.* into your custody upon any writ or writs, precept or precepts; and if the said *J. D.* be detained in your custody by any writ or writs, precept or precepts, other than such as particularly relate to us, or pleas of freehold, felonies, and appeals, that then you discharge the said *J. D.* out of your custody, and suffer him to go at large, as you will answer the contrary at your peril; and that you inform the party or parties, plaintiff or plaintiffs, in the said writ or writs, precept or precepts named, that he, she, or they may prosecute his, her, or their action or actions, suit or suits, in our court before us, by bill to be exhibited to us in our said court before us at Westminster, against the said *J. D.* if he, she, or they shall think it expedient so to do. Witness, Sir Charles Abbott, Knt. &c.

No. 3.

Notice to plead to be indorsed on copy.

No. 4.

Writ of privilege, stamp 5s. parchment. Care must be taken that it be directed rightly.

XIX. Cases in Action by Attorney, Plaintiff. C. P.

An attorney of this court may sue an attorney of K. B. by attachment of privilege; but if of the same court the proceeding must be by bill. *Lauder, one, &c. v. Cokayn, Bar. 44.*

Pledges not being added to the declaration, not error nor demurrable. *Littlehales, one, &c. against Bosanquett, Bar. 162.*

XX. PRACTICAL DIRECTIONS

As to Action by Attorney, Plaintiff. C. P.

The first proceeding by attorney plaintiff in this court is also by attachment of privilege, which is the same as that of K. B.; the return being a certain day in term; but it must have fifteen days between the teste and return; carry same with precipe to the prothonotary's; get it marked by the clerk of the warrants: nothing paid at either office; then get it sealed, pay 1d.

If bailable pay sheriff of London or Middlesex for warrant 4d.

Engross declaration on 4d. stamp paper; file or deliver same with notice; give rule to plead and demand plea, as in common cases.

The writ of enquiry differs somewhat. See FORM, No. 4, subjoined.

Also the writ of capias ad satisfaciendum. See FORM, No. 5, subjoined.

XXI. FORMS

Of Action by Attorney, Plaintiff. C. P.

No. 1.
Precipe for attachment of privilege.

Same as K. B. *mutatis mutandis*.

No. 2.
Attachment of privilege.

Same as K. B. *mutatis mutandis*.

No. 3.
Beginning and end of declaration.

[Court.]

— term, in the — year of the reign of King George the Fourth.

Middlesex, to wit. — was attached by a writ of our lord the king, of privilege issuing out of the court here, to answer to —, gentleman, one of the attornies of the court of our lord the king of the Bench here, according to the liberties and privileges of the same court, for such attornies and other ministers of the same court time out of mind used and approved in the same. And whereupon the said — in his proper person complains, that whereas, &c. (as in common cases, add pledges to prosecute.) See tit. DECLARATION, post.

No. 4.
Writ of enquiry.

George, &c. To the sheriff of Middlesex, greeting: Whereas —, late of —, was attached by our writ of privilege issuing out of our court here to be before our justices at Westminster, to answer —, one of the attornies, &c. (as in the declaration). For that whereas, &c. (copy the whole declaration) to the said —, his damage of £ —, as it is said, and it was in such manner proceeded in our said court of the Bench, that (here proceed as in a common writ of enquiry, but the writ must be returnable on a day certain, instead of on a general return day.)

No. 5.
The like of writ of capias ad satisfaciendum.

George, &c. To the sheriff of —, greeting: Attach — so that you may have him before our justices at Westminster on — next after —, to satisfy —, gentleman, one of the attornies of our court of the Bench here, £ —, which we adjudged to the said — in our same court, before our justices at Westminster, for his damages which he had sustained by occasion of a certain trespass on the case done to the said — at Westminster, in your county, whereof he is convicted, and have you there this writ. Witness, Sir Robert Dallas, Knt. at Westminster, the — day of —, in the — year of our reign.

XXII. *Cases in Actions against Attorney. C. P.*

In this court the bill can only be filed in term time. See 2 *Sel.* 15, and *Imp. C. P.* 569.

When an attorney is forejudged, the suit by bill is at an end, and the plaintiff, if he proceed, must proceed as against an indifferent person. *Vincent v. Willoughby*, one, &c. *Bar.* 43.

An attorney forejudged may be restored by judge's order, on payment of debt and costs.

But by *R. G. H.* 11 *G. II.* it is ordered, that from and after the last day of this term, where any bill shall be filed against attorney, C. P. no forejudger shall be entered against him thereupon for want of appearance, if the action be laid in London or Middlesex, and such attorney reside within twenty miles of London, until four days after notice in writing of filing bill to attorney or his agent, or left at his usual place of abode, and a rule given for appearance as usual; and if attorney reside above twenty miles from London, or the action be laid in any other county than London or Middlesex, then no forejudger shall be entered till eight days after notice to be given as aforesaid, and a rule to appear as aforesaid; the said days to be exclusive of the day of giving such notice.

XXIII. PRACTICAL DIRECTIONS

As to Action against Attorney. C. P.

Engross bill, 4d. stamp, parchment; proceed to the court C. P. at Westminster, and give same to one of the criers, who gets it signed by the prothonotary, and then calls the defendant three times in court; pay crier 1s.; and for the entries charged by the prothonotary, viz. 8d. per sheet, or 2s. each count.

After which annex a 2s. 6d. piece of parchment, on which to enter appearance; take it to the secondary, who will give a rule thereon for defendant to appear; file it with prothonotary; pay —, then give notice in writing agreeably to the rule, *R. G. H.* 11 *G. II.* above stated. See No. 2, FORM subjoined.

The defendant enters his appearance with the prothonotary; the declaration is then delivered, which is charged as in other cases, and if he plead, make up the issue. Begin with the memorandum of the declaration, if it be of the same term the bill was filed, but if not, obtain bill roll at the prothonotary's for the term of which the bill was filed; let the declaration be entered thereon exactly, and enter an imparlance over to the term of which the issue is to be entitled; pay prothonotaries 8d. per sheet; then draw the issue, which is also entered on the roll the term in which the issue is delivered; ingross it on a 4d. stamped paper. See No. 6, FORM subjoined.

But if the defendant do not duly appear a forejudger may be signed thus:

Engross the bill on the prothonotary's roll, which is to be had at the office; completely enter the memorandum and bill thereon, and at the end of same add the forejudger. See FORM No. 7, subjoined.

The same proceedings, or an incipitur thereof, are then to be engrossed on paper; 10s. stamp; take roll, and paper to the prothonotary's; pay 2s.; then to the clerk of the warrants, to strike defendant off the roll; pay 1s. 4d.; he will sign the paper and keep the roll.

The defendant being now no longer privileged, he is to be proceeded against by a new suit.

As to further proceedings on the part of an attorney defendant where sued irregularly, see page 146, ante.

XXIV. FORMS

In Action against Attorney. C. P.

No. 1. [Court.] _____ term, in the _____ year of the reign of King George the Fourth.
Beginning and ending of the bill against attorney C. P.

To the justices of our lord the king of the Bench. Middlesex, to wit. _____ by _____ his attorney, complains of _____, gentleman, one of the attornies of the court of our lord the king of the Bench, present here in court in his proper person, FOR THAT WHEREAS *(the same as any other declaration)* but instead of "And therefore he brings suit," conclude with "And therefore he prays relief." *(Add pledges.)*

A memorandum for the plaintiff on a 5s. stamp is to be filed at the same time.

No. 2. [Court.] _____, plaintiff.
Notice to plead thereon. _____ and _____, gentleman, one, &c. defendant.

Take notice, That a bill was this day filed in the prothonotaries office, in Tanfield-court, in the Inner Temple, London, against you as of this present _____ term, at the suit of the above plaintiff _____ in an action of trespass on the case on several promises, wherein the plaintiff lays his damage to £____, and unless you appear to the said bill in four days *(if in the country, and above twenty miles, eight days)* from the date hereof, you will be forejudged the court. Dated the _____ day of _____, 18—

Your's, &c.

To Mr. _____, the
above defendant. _____ attorney for plaintiff.

No. 3. [Court.] _____ term, in the _____ year of the reign of King George the Fourth.
Beginning and ending of declaration.

Middlesex, to wit. Be it remembered, That on the _____ day of _____, *(the day the bill was filed)* in this same term _____, came here into court by _____, his attorney, and exhibited to the justices of our lord the king here, his certain bill against _____, gentleman, one of the attornies of the court of our lord the king of the Bench, present here in court, in his proper person, the tenor of which said bill follows in these words: to wit, To the justices of our lord the king of the Bench. Middlesex (ss) _____ *(copy the bill to the end, with the pledges verbatim.)*

No. 4. Same as in the King's Bench.
Notice to plead thereon.

No. 5. George, &c. To the sheriff of Middlesex, greeting: Whereas _____, by _____, his attorney, came into our court before our justices at Westminster, and exhibited to our said justices his bill against _____, gentleman, one of the attornies of the court of the Bench, present in our said court in his proper person, of a plea. For that *(proceed with the declaration)* to the damage of the said _____ of £____, as it is said, and it was in such manner proceeded in our said court of the Bench; *(proceed as in a common enquiry, making the return on a day certain, instead of a general return day.)*

[Court.]

_____ term, in the _____ year of the reign of King George the Fourth.

Heretofore, as it appeareth, in the term of _____ last past, on the _____ roll it is thus contained; Middlesex, to wit. Be it remembered, that on the _____ in this same term, _____ came here into court by _____, his attorney, and exhibited to the justices of our lord the king of the Bench here, his certain bill against _____, gentleman, one of the attornies of the court of our said lord the king of the Bench, present here in court in his proper person, the tenor of which said bill followeth in these words, to wit, To the justices of our lord the king of the Bench, Middlesex, to wit, _____ complains of _____, gentleman, (*state the bill verbatim, with the pledges*).

And the said _____, in his own person, comes and defends the wrong and injury, when, &c. and prays leave to imparl thereto here until _____ (*the first day of term*) in this same term, and he hath it, &c. at which day come here, as well the said _____ by his said attorney, as the said _____ in his own person; and the said _____ prays that the said _____ may answer his said bill, &c.; and the said _____, as before, defends the wrong and injury, when, &c.; and says, that he did not undertake and promise in manner and form as the said _____ hath above thereof complained against him, and of this he puts himself upon the country, &c.; and the said _____ doth the like, &c. Therefore the sheriff is commanded that he cause to come here on _____ next after _____, twelve, &c. by whom, &c. and who neither, &c. because as well, &c.

[Court.]

_____ term, in the _____ year of the reign of King George the Fourth.

Middlesex, to wit. Be it remembered, that on the _____ day of _____, in this same term, _____ came here into court by T.S. his attorney, and exhibited to the justices of our lord the now king of the Bench here, his bill against _____, gentleman, one of the attornies of the court of our said lord the now king of the Bench here, present here in court in his proper person, in a plea of trespass on the case, the tenor of which said bill followeth in these words, to wit. To the justices of our lord the king of the Bench, Middlesex, to wit, _____, by _____ his attorney, complains of _____, gentleman, (*state the whole bill down to*) "and therefore he prays relief, &c." (*and add*)

Pledges for prosecuting, { John Doe,
and
Richard Roe.

Whereupon the said _____, being solemnly called, came not, therefore he standeth forejudged from exercising his office of attorney of this court for his contumacy, &c.

George, &c. To the sheriff of _____, greeting: Attach _____, gentleman, one of the attornies of the court of Common Bench, so that you have him before our justices at Westminster, on _____ next after _____ to answer us of and concerning those things which shall then on our behalf be objected to him, and have you there this writ. Witness, Sir Robert Dallas, Knt. at Westminster, the _____ day of _____, in the _____ year of our reign.

No. 6.

Entry of issue joined in a term subsequent to the term of which bill was filed.

Imparlancc, &c.

No. 7.

Form of forejudger.

No. 8.

Form of attachment for contempt against attorney C. P.

No. 9.
Form of interrogatories to be exhibited to attorney.

[Court.]

[Title cause.]

_____ term, in the _____ year of the reign of King George the Fourth.

_____ } Interrogatories to be administered to _____ of _____,
against } gentleman, one of the attornies of the court of our lord
_____ } the now king of the Bench, at Westminster, touching and
concerning a contempt, supposed to be committed by him against
the said court (or as the case may be).

(Here interrogatories in the common form are to be inserted, and at the foot thereof, the jurat is to be written thus.) The above-named _____ was sworn the _____ day of _____, in the year _____, true answer to make to such questions as shall be asked him on his examination on the above interrogatories, before me at my chambers in Serjeant's Inn, Chancery-lane.

(Signed)

ATTORNEY-GENERAL. Mentioned in this place to intimate to the practitioner, that actions for the recovery of penalties on the revenue laws must be commenced and prosecuted in the name of the attorney-general, or other officer of the revenue; as to customs and excise, see the 26 G. III. c. 77. s. 13; as to penalties on the lottery acts, see 36 G. III. c. 104. s. 38.; in respect of penalties on the acts relative to the stamp duties, see 44 G. III. c. 98. s. 10.

Anciently what. **ATTORNMENT.** Anciently attornment signified the consent of the tenant to the grant of the seignory; but this is rendered obsolete and almost useless by the 4 Ann. c. 16. s. 9. and by other statutes.

Modern acceptation.

In its modern acceptation, it may be said to be an acknowledgment signed by a person in possession of premises under a former landlord, of the right of another landlord. Attornment, in a strict sense, since the above statute of *Anne*, is wholly unnecessary to a plaintiff's title. *Moss v. Gallimore*, 1 Doug. 279. and also, notwithstanding the case in Shower alluded to, 2 Doug. 681, n.

The attornment is signed by one or more tenants, in order that sheriff's fees, poundage, &c. may be saved the lessor of the plaintiff in ejectment, who otherwise would, on obtaining judgment in ejectment, be obliged to issue a writ of possession.

See tit. EJECTMENT, *post*.

FORM*.

Be it remembered, that we whose names are hereunder written being the several tenants in possession of the premises in question in this cause, situate and being in the parish of _____, in the county of _____, do hereby severally attorn tenants to _____ of _____, the lessor of the plaintiff in this cause, for such parts of the said premises as are in our respective possessions; and we, and each and every of us, have this day severally paid to the said _____ the sum of 1s. upon

* I have purposely settled this form so that it be construed an attornment, merely. Should the words in italic be

added, an agreement stamp might be necessary.

such attornment, on account and in part of the rent due and to become due from us severally and respectively, for and in respect of the said premises, and we do severally and respectively become tenants thereof to the said — from the — day of — last past. As witness our hands, this — day of —, in the year of our Lord —

Witness

(Signed)

AVERMENT, *Writ of*. A writ for which the *alias distringas*, or *quare clausum fregit*, or proceeding by original writ, seems to be a substitute. See titles ORIGINAL, QUARE CLAUSUM FREGIT, *post*.

AVOIDANCE. See tit. REPLICATION, *post*.

AVOWRY. See tit. REPLEVIN, *post*.

AUDITA QUERELA. *Comyn's Digest*, and *Bacon's* and *Viner's* *What. Abridgments*, will afford information upon this almost obsolete writ.

An action of the most remedial nature, invented lest in any case there might be an oppressive defect of justice, where the party has a good defence, but has neglected to take advantage of it in the ordinary course. 3 *Bl. Com.* 405.

And it is of common right. *Nathan* and another *v. Giles* and another. 5 *Taunt.* 558.

A case of *audita querela*, viz. *Lord Porchester v. Petrie*, occurred within these thirty years; a note of the proceedings on which will be found, 2 *Saund.* 148. b.

The indulgence now shewn by courts in granting summary relief upon motion in cases of evident wrong, has almost rendered useless the writ of *audita querela*, and driven it quite out of practice. 3 *Bl. Com.* 405. *Ld. Raym.* 439.

Notwithstanding the high authority on which this observation is founded, *audita querela* has been entertained in C. P., and the parties went to trial thereon, and after verdict the defendant moved in arrest of judgment; but the court held, that he ought either to have demurred at the time of filing the writ of *audita querela*, or if the verdict were given against him, that he should bring a writ of error, or that he should move for a new trial. *Giles* and another *v. Nathan* and another, 1 *Marsh.* 296. 5 *Taunt.* 558. S. C.

Bail being fixed with the debt, and having paid it, sue the principal, and obtain judgment, after a commission of bankrupt has issued against him, but before he has obtained his certificate. After he obtains it, the bail in the second action apply to be exonerated, on the ground that the plaintiffs, the bail in the original action, might prove their debt under the commission by virtue of stat. 49 G. III. c. 121. s. 8. The court of C. P. refused to interfere summarily, but left the bail to their writ of *audita querela*. *Hewis v. Mott*, *Dalby v. Same*, 2 *Marsh.* 37. S. C. not S. P. 6 *Taunt.* 329.

But it seems, that wherever the writ of *audita querela* may relieve the defendant, the court will afford him such relief without putting him to this writ. *Giles and another v. Nathan and another*, 1 *Marsh.* 296. And see *Lister v. Meredith*, 1 *B. & P.* 42. S. P.

And where the relief is questionable, the defendant cannot move in arrest of judgment, but must either demur at the time of filing the writ of *audita querela*, or, if the verdict be given against him, must bring a writ of error, or move for a new trial. *Giles v. Nathan*, 1 *Marsh.* 296.

Still, a general outline of the practice may not be unacceptable to the practitioner, though it is very unlikely that in a practice almost obsolete, he would entirely trust to his own researches.

The writ of *audita querela*, where the record upon which it is founded remains, is *judicial*; *F. N. B.* 105, b. but it may also issue out of Chancery, it is then *original*.

PRACTICAL OBSERVATIONS.

The writ of audita querela is bespoken of the cursitor, on a precipe containing the names of the parties. It is allowed only in open court; the secondary indorses an allocatur thereon in court.

If the party be in actual custody on the first arrest, he must first put in bail; of this he must give due notice in the usual manner to the opposite party. See tit. BAIL, post. Four bail are necessary. See FORM subjoined. Stamp, 6s.

The release or other instrument upon which the motion for the writ is founded, must be duly proved in open court; which being done, and the bail allowed, a supersedeas will be granted.

If the plaintiff in the audita querela be in custody on the execution, he cannot be bailed until the defendant shall have pleaded, unless he be an infant.

The writ being granted, a process issues; if the writ be founded on the record, and the party be in custody on execution, the process is by scire facias; if founded on matter of fact, and the party not in custody, the process is a venire facias, and on default thereon a distringas ad infinitum.

If the first suit were by original, the teste and return must be as by original writ; aliter, if by bill; seven days betwixt the teste and return of each scire facias sufficient; the defendant in the audita querela must be warned to appear.

On the appearance of the defendant, the plaintiff declares; the writ of audita querela is recited in the declaration, as in declaring on a scire facias.

The whole matter of the record; the gravamen; the award of the scire facias or venire; the recognizance of bail, (if any); the return to the scire facias or venire; and lastly, the defendant's appearance, are set out in the entry of the declaration.

If the defendant confess the matter alleged, judgment and discharge are pronounced for the plaintiff; otherwise the cause goes on to issue as in other cases.

No damages or costs are given. Dyer, 194, a.

If, however, the money be paid over in the first action, it seems doubtful whether even audita querela will lay.

FORM.

In the King's Bench.
 _____ term, in the _____ year of King
 George the Fourth.
 _____ to wit. R. R. of _____ is de-
 livered on bail to prosecute with effect a writ of
audita querela, brought by him, to be discharged of
 and from a judgment given against him in the
 court of our lord the king, *before the king himself*,
 [or, "of the Bench," as the case may be]
 at the suit of one J. D. for _____ pounds of
 debt, and for damages, costs, and charges to
 X. Y. of _____
 U. W. of _____
 T. V. of _____
 and
 R. S. of _____
 P. Q. Attorney.

Form of the re-
 cognizance of
 bail on *audita*
querela.

AUTER ACTION PENDENT. *Another action for the same cause of action pending.* If it shall happen that a plaintiff, before the termination of process already commenced, founded upon an earlier cause of action, shall issue and proceed upon a second process, founded upon the same cause, the defendant may plead that fact ; and if true, he will obtain judgment that the second bill or writ, as the case may be, will be quashed ; but being pleaded in abatement, the plaintiff does not pay costs.

AUTHORITY OF LAW. This may be pleaded in justification in an action of trespass.

AWARD. And see tit. **ARBITRATION**, *ante*, p. 67. The practice and much of the law respecting award will already have appeared under title *Arbitration*, to which reference is above made. But the following cases bearing more upon award particularly, than upon arbitration generally may well find insertion under this title.

If all matters in difference in the cause are agreed to be referred to an arbitrator, and the associate by mistake draw up the order of reference generally, as to all matters in difference between the parties, it cannot be amended, but the parties must go down to another trial. *Rawtree v. King*, 5 *J. B. Moore*, 167.

When a rule to shew cause is obtained in the court of K. B. to set aside an award, the several objections thereto intended to be insisted upon at the time of making such rule absolute, must be stated in the rule to shew cause. *R. E. 2 G. IV. 4 B. & A. 539.*

If an objection to the stamp be not alleged as a ground for obtaining a rule to shew cause to set aside an award, the court will not suffer it to be relied upon afterwards when cause is shewn. *Liddell v. Johnstone*, *H. 38 G. III. K. B. 2 Tidd*, 874.

Where the defendants in an extent in aid withdrew their plea, and suffered judgment to be entered up upon an agreement to sub-

Where order of
 reference cannot
 be amended.

What to be stated
 in rule nisi for
 setting aside
 award.

What omission
 material.

What tantamount
 to a consent to an
 enlargement of
 time.

mit to arbitration the question of the amount of what was due to the prosecutor, provided the award was made by a given time, and the arbitrator did not make his award till after the expiration of a future period, to which it had been agreed to extend the time, and where the conduct of the defendants, and a letter written by their solicitor, were held equivalent to a consent to extend the time; and that therefore the Court of Exchequer refused to set aside the judgment and the proceedings thereon, and the award, and allow the defendants to plead to the extent, see the King, (in aid of Mytton) *v. Hill*, 7 *Price*, 636.

Where enlargement of time made too late.

Where the arbitrator had power to enlarge the time for making his award under the order of *Nisi Prius*, and the indorsement was dated on a day subsequent to the expiration of the time originally given for making the award, the court discharged a rule *nisi* for an attachment for non-performance of the award. *Good v. Wilks*, *H. 56 G. III. K. B. 2 Tidd*, 859.

As to revocation.

After issue joined, and notice of trial given, a cause was referred. It appeared doubtful on affidavits whether the award was made previous or subsequent to a revocation of the submission. The court refused to stay proceedings, but left the defendant to plead the award. *Lowes v. Kermode*, 8 *Taunt.* 146.

Where a cause was referred by order of *Nisi Prius*, and the plaintiff became bankrupt after the reference, but before the making the award, held to be no revocation of the submission. *Andrews v. Palmer*, 4 *B. & A.* 250.

Where a cause was referred to arbitration under a judge's order, and one of the parties, before the award was published, and before the judge's order was made a rule of court, revoked his submission, the arbitrator having made an award notwithstanding this revocation, the court set aside the award, although the judge's order had been made a rule of court before any application to set aside the award. *Clapham v. Higham*, 1 *Bing.* 87.

An award against trustees and guardians of an infant, tenant for life of the realty, who died before the award was made, is not binding. *Bristow v. Binns*, 3 *D. & R.* 184.

Where death of arbitrator opens the cause.

Where a plaintiff obtained a verdict subject to a reference, and the arbitrator died before making his award, and the parties agreed that another should be substituted in his stead, and one of them afterwards objected to such substitution; C. P. refused to interfere, as the death of the arbitrator had the effect of opening the cause, and as execution could not be sued out on the verdict on account of such death. *Harper v. Abrahams*, 4 *J. B. Moore*, 3.

What immaterial.

An action of ejectment was referred to arbitration, and the reference which was confined to that action stated, that if the arbitrator should award that the plaintiff had any cause of action, he should have costs as in a court of law. The arbitrator by his award directed the defendant to deliver up the premises, and pay the costs of the action, and a sum of money to the plaintiff for the loss of rent during the time the defendant held possession. He also directed the parties to execute general mutual releases. On a motion for an attachment against the defendant for the sum awarded to the plaintiff, held that the award was in that respect good, although the arbitrator did not find in terms that the plaintiff

had any cause of action; and also, that if the award were bad as to the direction of mutual releases, that would not vitiate the whole award. *Doe, d. Williams v. Richardson*, 8 *Taunt.* 697.

Six partners entered into two bonds of submission to arbitration: in the one three gave a joint and several bond to the other three, conditioned for the due performance of the award, and the latter gave a similar bond to the three former. The arbitrator awarded that one of the three former should pay a certain sum to one of his co-obligors. In an action of debt on the award brought by the one against the other alone: Held, that he might recover the sum awarded. *Winter v. White*, 3 *J. B. Moore*, 674. *S. C.* 1 *Brod. & Bing.* 350.

Where action may be brought by one of several obligors in bond for reference, against one of several obligees in the same bond.

If, upon a reference of actions in this court, and award of a sum to be paid by each party, the party entitled to the larger sum, sues in K. B. in order to make the defendant's set-off subject to the lien of his attorney for his costs, C. P. will not interfere to enforce the set-off, nor will they order the award to be delivered up. *Symonds v. Mills*, 8 *Taunt.* 526.

Where court refused interference as to attorney's lien.

Application may be made to the courts for setting aside an award, upon the ground of collusion, or gross misbehaviour of the arbitrators. *Sturt v. Moggridge*, *E.* 43 *G. III.* K. B. 2 *Tidd*, 872.

Collusion of arbitrators ground for setting aside award.

The arbitrator to whom an action on the case for a fraudulent representation of the circumstances of *A.* was referred, acquitted the defendant of the collusion thereby imputed, and of all fraud in the representation, the subject-matter of complaint in such action; but feeling himself compelled by adjudged cases, which he mentioned, to decide that the knowledge of the falsehood of the thing asserted was in itself fraud and deceit, he awarded in favour of the plaintiffs. The court set aside the award on the ground that the arbitrator had, on the face of it, acquitted the defendant of fraud and deceit. *Ames and others v. Milward*, 8 *Taunt.* 637.

Contradiction therein also a ground.

If arbitrators, having proceeded in a reference, inform the defendants present at the meeting, that they would suspend their proceedings till books of account had been referred to, and they afterwards made an award in his absence, without examining such books: Held to be a good ground for setting aside the award. *Pepper v. Gorham*, 4 *J. B. Moore*, 148.

Where, after what language held by him, arbitrator makes his award, it shall be set aside.

On a motion respecting an award of commissioners under an inclosure act, K. B. said, "we may punish upon this if there be any corruption, or enforce its execution by *mandamus*; but we are not to interpret or set aside these awards upon complaint of their obscurity, &c." *Case of the Over Kellet Inclosure Act*, *H.* 38 *G. III.* K. B. 2 *Tidd*, 875.

Obscurity, where no objection.

C. P. refused to set aside an order of *Nisi Prius*, referring a cause to arbitration on an affidavit by defendant that she desired her attorney not to refer. *Ex parte Lady Turner*, *H.* 2 *G. IV.* C. P. *Filmer v. Delver*, 3 *Taunt.* 486. *Griffiths v. Williams*, 1 *T. R.* 711. *S. P.*

Where attorney consents to reference.

By an order of reference, all matters in difference in a cause between *A.* and *B.* were referred to an arbitrator, and by a subsequent order *C.* was made a party thereto, and it was directed that all matters in difference between *A. B.* and *C.* should be referred

Where not final, bad.

to the same arbitrator, and that the costs of the suit should abide the event of the award. The arbitrator made two awards; in one of which he awarded that *A.* was indebted to *B.* without mentioning *C.*, and in the other, that *A.* was indebted to *C.*, without mentioning *B.*: Held, that both these awards were bad, as he had not decided all the matters in difference between all the parties. *Winter v. White*, 2 *J. B. Moore*, 723.

Where award by barrister contrary to law.

Even where matter of law alone, and no matter of fact is referred to a barrister, the court will not set aside an award made by him, on the ground that it is contrary to law, unless the illegality appear upon the face of the award. *Cramp v. Symons*, 1 *Bing.* 104.

Where not set aside, unless for error upon face of award.

Where the law and fact are referred to an arbitrator, the award will not be set aside, unless there appear to be error in the law upon the face of it. *Doe v. Thompson*, 1 *Chit. R.* 674. n.

Nor being founded on an indictment.

An award cannot be set aside on the ground that the arbitrators have decided contrary to law, unless the law be clear upon the subject, therefore the court refused to set aside an award, as with reference to the circumstances of the case, it was not inconsistent with any principle of law. *Richardson v. Nourse*, 3 *B. & A.* 237.

Nor for not specifying for what sum judgment, &c.

K. B. will not entertain an application for setting aside an award, founded upon an indictment at the assizes, for not repairing a road, though the question in dispute be of a civil nature. *The King v. The Inhabitants of Cotesbach*, 2 *D. & R.* 265.

Where court will interfere to compel another reference.

An order of *Nisi Prius* referring an action of debt on a money bond, where the issue was payment by a co-obligor and all matters in difference to arbitration, does not require the arbitrator to direct for what sum the verdict shall be entered; and the court refused to set aside an award, directing the verdict to be entered generally for the plaintiff, on a suggestion that the arbitrator ought to have directed for what sum judgment and execution should have been taken out without proof that there were other matters in difference between the parties. *Cayme v. Watts*, 3 *D. & R.* 224.

But not where objections to award are pleadable.

Where a verdict was found for the plaintiff for the damages in the declaration, subject to the award of an arbitrator, but who declined proceeding in the reference: Held, that the plaintiff was entitled to judgment and execution forthwith, unless the defendant consented to refer the amount of damages to another arbitrator. *Woolley v. Clark*, 2 *D. & R.* 158.

As to costs.

And where it appears that objections to an award are pleadable to any action to be brought thereon, *K. B.* will not set it aside; neither will they grant an attachment for non-performance. See the case, and the placitum very like a case. *In re Cargay and Aitchison*, *Id.* 222.

Where a cause and all matters in difference were referred to an arbitrator, but nothing was said about costs: Held, that the arbitrator had power over the costs of the cause, but not those of the reference. *Frith v. Robinson*, 1 *B. & C.* 277.

Where a cause is referred to arbitration, and the costs are to abide the event of the award, the defendant is entitled to them if it appear by the award that the plaintiff's demand was originally under 40s. and he might have recovered it in the court of conscience. *Butler v. Grubb*, *H.* 23 *G. III.* *K. B.* *Watson v.*

Gibson, *H.* 53 G. III. K. B. Harrison *v.* Slater, *T.* 44 G. III. K. B. 2 *Tidd*, 862.

Where the cause goes off upon an ineffectual arbitration, and is afterwards tried, costs are allowed as upon a *remanet*. Sparrow *v.* Turton, *T.* 7 G. III. C. P. *Id.* 864.

If an arbitrator award, among other things, that each party shall pay a moiety of the costs of the arbitration, and of making the submission a rule of court, and one party, in order to get the award out of the hands of the arbitrator, pay the whole, it seems that he may have an attachment against the other party if he refuse to pay his moiety. Stokes *v.* Harris, *M.* 45 G. III. K. B. *Id.* 866.

Where an arbitrator authorised to tax costs in a cause has allowed an item which it is insisted ought not to have been charged, the court will not refer the matter to the master. Anon. 1 *Chit. R.* 38.

Where a cause has been referred to arbitration, and costs are to abide the event, that means legal event; and therefore, where in an action of trespass to land, the arbitrator found no damages for plaintiff, but directed both parties to pay their own costs: Held, that the plaintiff was entitled to no costs. Willis *v.* Osborne, *Id.* 183.

An arbitrator under a rule of reference, which directs that the costs of the cause shall abide the event, has no power to direct those costs to be set off against the costs in a prior cause, although all matters in difference are referred. But the award is not to be set aside entirely, but only for that part which is incorrect. Hunted *v.* Kidd, *Id.* 527.

Where the submission is made a rule of court, it is no answer to an attachment in the K. B. for non-payment of the sum awarded. Grant *v.* Hawding, 4 *T. R.* 313. n.

Personal knowledge of an award and rule of court makes the party liable to an attachment for not performing the award, although he had not personally served. In the matter of Bower, 1 *B. & C.* 264.

Where foreign attachment no answer to motion for attachment. What shall dispenso with service.

PRACTICAL DIRECTIONS.

It may be expedient that a few points merely practical should be recollected.

1. That the award be made in manner prescribed by the instrument of submission, as, for instance, should that require the hand and seal of the arbitrator, it would scarcely be advisable to withhold the seal.

2. It should be made in time, that is to say, on or before the day specified in that respect in the instrument of submission.

3. And if made subsequently to such day, it should be seen how far the arbitrator had power to enlarge the time for making his award beyond such day; e. g. by the instrument of submission the arbitrator might not be enabled to enlarge the time more than once, or his power might extend to enlarge the time oftener than once, regard should therefore be had to the terms of this power.

4. It seems to be of great importance that the attorney should be well assured not only of the ability, but of the inclination of his client to afford the means for taking up an award to be made by a barrister or other professional person, whose judgment upon the matters in dispute

AWARD; PRACTICAL DIRECTIONS; FORMS.

may have been sought; for in a case wherein the assignees of a bankrupt's estate had, by their solicitor, occupied the attention of a professional person to investigate very long accounts connected with the bankruptcy, and solicited this interference to determine other differences between the parties, the assignees refused, on learning the result of the award, to take it up, they not having or anticipating assets. There was no obligation on the part of their solicitor personally, to take up the award; with relation to him therefore, personal resort was out of the question; and the arbitrator having neglected to take an especial undertaking for remuneration, had nearly missed the hard merited compensation for three years labour. The solicitor at length insisted upon the assignees fulfilling an undertaking at least implied on their parts to pay their proportion of the award; they ultimately did so, and the matter ended.

5. It seems advisable therefore, that in every case of magnitude, the arbitrator should not only take a special authority, to which should be annexed an agreement for compensation, but also that the solicitor himself should be armed with the means of enforcing payment of any sum he might feel himself bound to pay to the arbitrator on taking up the award; and some arrangement of this description seems to be necessary on all sides, since it has been decided that an arbitrator, in the absence of a special promise, cannot recover any remuneration for his interference in that character; and it might be very doubtful whether the solicitor, without an express authority, could recover back from his client money paid to an arbitrator.

6. Regard should be had also to the stamp.

7. That the award should be pertinent to the matter referred, and wholly embrace it. That it be final will be sufficiently apparent from the cases cited under the present title, and more especially under title ARBITRATION, ante, page 67.

Whatever is said of award made by arbitrator, is equally applicable to award made by umpire.

FORMS.

No. 1.
Award by original referee, and his nominee; plaintiff on rule, K. B.

To all to whom, &c. We, *E. F.*, of ———, and *G. H.*, of ———, send greeting: Whereas by a rule of his majesty's court of K. B. at Westminster, made on ——— next after ———, in the ——— year of the reign of king George the Fourth, in a cause then depending in the said court, wherein *A. B.* was the plaintiff, and *C. D.* was the defendant, reciting, as therein was recited, it was (upon hearing counsel for the said plaintiff and defendant) that [*recite order*]. And whereas I, the said *E. F.*, by virtue of the authority given me by the said rule, did nominate and appoint the said *G. H.* to act with me in the said reference before proceeding on the same; and whereas the time limited for making our said award has been duly enlarged until the ——— day of ——— instant. Now therefore know ye, that we the said *E. F.* and *G. H.*, having, in pursuance of the said rule of reference, been attended by the said parties, by themselves and their attorneys, and having heard the allegations and answers by the said parties respectively made and given touching the matters in difference between them, examined their witnesses upon oath, and considered thereon, do award, order, adjudge, find, and determine of, upon and concerning the premises in manner following; (that is to say), we do award and order that the defendant do pay to the plaintiff of his assigns the sum of £——, which we find to be due and owing to the plaintiff on a settlement of all accounts, and matters of accounts,

dealings, and transactions between him and the defendant, and so referred to us as is in that behalf above stated. And we do also award and order that the said plaintiff shall and do pay unto —, of —, upon the delivery of this our award, the sum of £—, for the costs of us, the said arbitrators in the said reference, the preparing our award, and the stamps thereon. In witness whereof, we have hereunto respectively set our hands, the — day of —, 18—

Signed and published, being first duly
stamped, in the presence of

E. F.
G. H.

L. M.

To all to whom, &c. I, *E. F.* of —, send greeting: Whereas by an order of Sir Charles Abbott, Knt. chief justice of his majesty's court of K. B. at Westminster, bearing date the — day of — instant, made in a cause then and now depending in the same court, wherein *A. B.* is plaintiff, and *C. D.* is defendant, the said chief justice, upon hearing the attornies or agents on both sides, and by their consent, did order, amongst other things, that [*recite order*] as by the said order may appear. Now therefore know ye, that I, the said *E. F.* the arbitrator in the said order named, having taken upon me the said arbitrament, and having heard, examined, and considered the allegations and proofs of both the said parties of and concerning the premises, do thereupon make this my award in writing of and concerning the same; (that is to say), I do award, adjudge, and determine, that all further proceedings in the said cause shall, from the date hereof, cease, and be no further prosecuted; and that the said *C. D.* shall and do, on the — day of —, between the hours of — and — of the clock of the same day, well and truly pay, or cause to be paid unto the said *A. B.*, or his attorney, — of —, at —, the sum of £—, of lawful money of Great Britain, in full of all demands, in the said cause; and that upon payment thereof the said *A. B.* shall, if required so to do, by and at the costs of the said *C. D.* execute and deliver to the said *C. D.* a release, in writing, of all and all manner of action and actions, cause and causes of action, debts, duties, claims, and demands whatever, from all times past, until the day of the date of the aforesaid order. And I do further award and direct, that the said *A. B.* and *C. D.* shall and do bear and pay each his own costs of the reference, and of this my award. In witness whereof, I have hereunto set my hand, this — day of —, 18—

E. F.

No. 2.
Award for plaintiff on a judge's order, K. B.

To all to whom, &c. I, *E. F.* of —, send greeting: Whereas at the sitting at Nisi Prius, holden at the Guildhall of the city of London, (if at Westminster Hall, say "at the Great Hall of Pleas there, in and for the county of Middlesex,") on —, the — day of —, 18—, before Sir Charles Abbott, Knt. chief justice of our lord the king, assigned to hold pleas before the king himself, a cause came on to be tried, wherein *A. B.* was plaintiff, and *C. D.* defendant, and thereupon a certain order of Nisi Prius was then and there made, whereby it was ordered by the said court, by and with the consent of the said plaintiff and defendant, their counsel and attornies, that [*recite order.*] Now know ye that I, the said *E. F.* having taken upon myself the said reference, and heard, examined, and considered the several allegations and proofs of, and made by the said parties respectively, do, in pursuance of the said order, make and publish this my award in writing, of and concerning the matters referred to me as aforesaid, in manner following; (that is to say,) I do

No. 3.
The like on an order of Nisi Prius, K. B.

find and adjudge that the said *A. B.* is entitled to recover of and from the said *C. D.* in the said cause, the sum of £—; and I do award and order the said *C. D.* on —, the — day of — instant, to pay or cause to be paid to the said *A. B.* or to —, his attorney, to and for the use of the said *A. B.* at his office, situate at —, between the hours of — and — on that day, the said sum of £—; and I do further award, that the said *C. D.* shall bear and pay all the costs of attending me in this reference; and further, I do award, that the said *A. B.* shall, upon the delivery of this award, pay all the costs and charges attending the making and preparing of the same, which said last-mentioned costs and charges I do hereby order and direct the said *C. D.* immediately to repay to the said *A. B.* In witness, &c.

No. 4.
Award reducing
the damages
found by the
jury.

To all to whom, &c. I, —, of —, send greeting :
Whereas at the sitting at Nisi Prius, [*set out order as before.*] Now therefore know ye that I, the said —, having taken upon myself the said reference, do hereby make and publish my award in writing of and concerning the matters, and each of them above referred to me; (that is to say,) I do award and order that the damages found by the jury be reduced to, and be the sum of £—, for which said sum I do award that the said plaintiff may enter up his judgment, and that the said defendant shall pay to the plaintiff the costs of the reference, the same costs being first taxed by the proper officer of the said court of King's Bench. In witness whereof, &c.

No. 5.
The like on an
order of Nisi
Prius in C. P.
that the plaintiff
had no cause of
action.

To all to whom, &c. I, —, of —, send greeting :
Whereas at the sitting within — Term last, holden at the Guildhall of the city of London, (*or* at Westminster, in the Great Hall of Pleas there, in and for the county of Middlesex), on —, the — day of —, in the year of our lord 18—, before Sir Robert Dallas, Knt. lord chief justice of his majesty's court of C. P. at Westminster, an order was made in a cause then depending in the same court, wherein *A. B.* was plaintiff, and *C. D.* was defendant, whereby [*state the ordering part.*] Now know ye that I, the said *E. F.*, the arbitrator named and approved as aforesaid, having taken upon me the said arbitrament, and heard, examined, and considered the allegations and proofs of and made by the said parties concerning the premises, do thereupon make this my award in writing, of and concerning the same; (that is to say,) I do award, adjudge, and determine, that at the time of the commencement of the said writ, the said *A. B.* had no existing cause of action whatever against the said *C. D.* in respect of the said several matters to me referred, or any of them; and I do award, order, and direct that a verdict in the said action be entered for the said *C. D.*; and that the said *A. B.* and *C. D.* shall respectively bear and pay their own costs of and attending the reference, and preparing and making of this my award. In witness whereof, &c.

No. 6.
The like where
arbitration bonds
have been exe-
cuted.

To all to whom, &c. I, *E. F.* of —, send greeting :
Whereas divers differences and disputes having arisen and been depending between *A. B.* of —, and *C. D.* of —, the said *A. B.* and *C. D.*, in order to put a final end to the said differences and disputes, did agree to refer the same to an award, order, and determination, and did by their several writings obligatory, dated the — day of —, respectively become bound each to the other in the penal sum of £— of good and lawful money of Great Britain, with conditions under the said writings obligatory, respectively written,

[set out condition, by way of recital,] as by the said writings, obligations, and conditions thereunder-written may more fully appear. Now know ye that I, having taken upon me the charge of the said arbitrament, and been attended by the said parties, and their respective solicitors, and having heard and considered the allegations of the said parties, and heard, examined, and considered the evidence of the witnesses adduced and brought forward respectively concerning the premises, do thereupon make this my award in writing, concerning the same matters to me referred; (that is to say,) I do award, arbitrate, and determine, that the said *C. D.* his executors or administrators shall and do pay, or cause to be paid to the said *A. B.*, his executors or administrators, on ———, the ——— day of ——— next ensuing the day of the date thereof, between the hours of ——— and ——— of the clock of the same day, at ———, the sum of £——, of lawful money of Great Britain; and that upon payment of the said sum of £——, to the said *A. B.* as aforesaid, the said *A. B.* and *C. D.* shall and do respectively sign, seal, and as their respective acts and deeds, and deliver each unto the other of them, mutual general releases in writing of all, and all manner of action and actions, cause and causes of action, bills, bonds, specialties, controversies, claims, and demands whatever, from the beginning of the world until the day of the date of the said writings obligatory. In witness, &c.

BAIL, Common. See also tit. **APPEARANCE**, *ante*.

The same proceeding as on *appearance* in K. B. or C. P. viz. an act of a defendant in K. B. by which he is enabled to defend the suit instituted against him. In K. B. where proceeding is by bill, this act is called filing *common bail*; in contradistinction to putting in special bail. What.

A defendant who has been served with a copy of process, &c. is to appear at the return thereof, or within eight days after the return thereof. Stat. 5 G. II. c. 27, reciting stat. 12 G. I. c. 24, or he may appear before the return of the writ. *Wynne v. Wynne*, 1 *Wils.* 35; or if the writ be returned and not served, *Moor v. Watts*, *Ld. Raym.* 616; or before any writ issued, but then process must be sued within fourteen days afterwards. *T. 4 W. & M.* 1 *Sel.* 95. When filed.

The eight days are to be reckoned exclusively of the return day of the writ, as if the writ be returnable the 6th November, the defendant has all the 14th to appear, and if the last day fall on a Sunday, he has the whole of Monday to file common bail. And the plaintiff cannot file a declaration *de bene esse* after the 8th day exclusively. *Shadwell v. Angel*, 1 *Bur.* 56. Time, how reckoned.

It must be filed as of the term the writ is returnable. *Edgar v. Farmer*, *Cas. t. Hardw.* 138. Of what term.

Most of the practical cases as to appearance to process, have been abstracted under the head "*Appearance, C. P.*" a term of the same import with Common Bail, K. B. See, therefore, tit. **APPEARANCE**, *ante*. Where common bail or appearance ordered.

Where, in case of arrest, the court will or not interfere to order discharge on filing common bail, see titles **AFFIDAVIT**, **APPEARANCE**, **ARREST**, *ante*.

But where the defendant was arrested by an attorney upon his bill delivered, but not signed by him pursuant to the statute, the

BAIL, Common ; PR. DI. ; CASES.

court refused to order discharge upon entering common appearance, saying, that the objection was matter of defence on trial. *Tomlinson v. Clark*, 4 J. B. Moore, 4.

PRACTICAL DIRECTIONS.

WARRANT or MEMORANDUM TO DEFEND must be prepared. See tit. MEMORANDUM TO DEFEND, *post*.

Get a common bail-piece at the stationer's ; stamp, 2s. 6d. on the parchment, shaped thus, enter the common bail.

_____ term, in the _____ year of the reign of King George IV. Ellenborough and Markham.	
[County] to wit.	{ Thomas Stiles having been served with process, is delivered to bail
If filed according to the statute, say "Filed according to statute."	to John Doe and Richard Roe,
at the suit of Richard Wilson.	
_____, attorney,	
_____, 18 _____.	

File this and the warrant with the clerk of the common bail office, King's Bench office ; pay in term, or within six days after, 1s. 2d. ; in vacation, 1s. 6d.

BAIL. Common Bail, filing according to the Statute.

What.

The same as entering APPEARANCE, according to the statute, C. P. which see *ante*, due attention being paid to officers and offices, of the court ; except that the common bail is entered on parchment, shaped as above ; no warrant, as observed *ubi supra*, is necessary.

In the affidavit, state the name of the process, with a copy of which the defendant hath been served ; in town it is usually sworn at the office ; it cannot be sworn before a commissioner, the attorney in the cause.

If the defendant be sued by a wrong Christian name, and he appear by his right name, he may be declared against by the plaintiff ; but the plaintiff cannot file common bail for him by his right name and then declare against him. *Doo v. Butcher*, 3 T. R. 611. *Corbett v. Bates*, *Id.* 660. *Delanoy v. Caunon*, 10 East, 328. *Dring v. Dickenson*, 11 *Id.* 225. See titles ARREST, *ante*, page 84 ; BAIL, Deposit in lieu of, *post* ; DEPOSIT, in lieu of Bail, *post* ; WARRANT OF ATTORNEY, JUDGMENT ON, *post*.

Above or Special Bail.

Observation.

In common bail, the names are fictitious.

Bail *above*, or special bail, are required to be substantial house-keepers, and it is contradistinguished not only from common bail, but also from bail *below*, or bail to the sheriff. What.

Bail *above*, or special bail, are two, not often more persons who undertake generally, or in a sum certain, that if the defendant be convicted he shall satisfy the plaintiff, or render himself to proper custody, according to the practice of the court, where the recognizances shall be taken. *Toml. Jac. L. D. **

Special bail, as we have already seen, admits of being treated under two distinct heads, viz. *bail below*, or bail to the sheriff by bond; and *bail above*, or bail to the action by recognizance; but *bail below* more properly belongs to the head BAIL BOND; which title see.

Where put in after judgment, the recognizance is taken in double the amount of the sum recovered. *Hill v. Stanton, H. 55 G. III. K. B. 1 Tidd, 275.*

Previously to putting in his bail above, the defendant should be aware that bail cannot be witness. But if a person whose testimony may be available by the defendant, shall have become bail as above, such person may, on motion on an affidavit of the facts, and in adding and justifying another bail instead of his, be struck out of the bail-piece; no cause being shewn to the contrary. See *Young v. Wood, Bar. 69. Wheatley v. Fearnley, E. 33 G. III. C. P. Imp. C. P. 185.* Caution where bail may be witness.

It is a general rule in both courts, that no attorney shall be bail in any action or suit depending therein. *R. M. 1654. s. 1. R. M. 14 G. II. reg. 1. K. B. R. T. 24 Eliz. s. 8. R. M. 6 G. II. reg. 5. C. P. 1 Chit. R. 8. 1 Tidd, 270.*

For the purpose of immediately surrendering the defendant to custody, any persons may be put in as bail above, even an attorney or his clerk. *Per cur. M. 42 G. III. K. B. 1 Tidd, 270. 2 Bl. R. 1180. C. P.* But it is always advisable that they only should become bail above who may also be able to justify; the reason for this will presently appear. Who may be.

But as an attorney cannot justify, so it also appears that in C. P., if one be put in as bail, even though another person be afterwards added in his stead, *Jackson v. Hillas, E. 45 G. III. C. P., 1 Tidd, 271; Bell v. Gate, 1 Taunt. 162*, the bail may be treated as a nullity, and the bail-bond assigned. *Fenton v. Ruggles, 1 B. & P. 356. Redit v. Broomhead, 2 Id. 564. And see 1 Taunt. 162. 164. ubi supra.*

* No question occurring in practice is more overlaid with cases, points, and decisions, than this relating to bail generally; and as scarcely one of them is not referable to some general principle, it should seem to be a work of mercy wrought for the benefit of the profession that the citation of those cases were spared or rendered unnecessary. As reported, they are numerous, and sometimes perplexed and contradictory,

often differing like shadows in shade, and yet scarcely distinguishable in point, or if distinguishable, not in principle. If the skill of a practical writer be not, while treating this head, put to the test, his patience is. But even patience is severely taxed by the citation of 500 cases, many of them really very insignificant, and yet found in the reports of the day.

At whose instance.

Bail above may be put in for the defendant, without his consent, by bail below, *Hagget v. Argent*, 7 *Taunt.* 47; that is to say, by the bail to the sheriff. But as to this last position *quære*?

In the Exchequer.

And in the Exchequer, where bail have been put in by a defendant, but not perfected, the sheriff's officer may put in and justify other bail for his own indemnity. *Hopkins v. Peacock*, 5 *Price*, 558. So, it is no objection in that court that bail are put in by a different clerk in court without an order first obtained for leave to change the clerk in court, or notice given of the change to the plaintiff or his attorney. *Id. ib.*

Within what time it must be put in in town, K. B.

In town, bail above may be put in before the return of the writ, after an arrest, but never before the arrest, without consent. *Huggins v. Bambridge*, *Bar.* 83. But for the purpose of surrender, it may be put in before return. *Hyde v. Whiskard*, 8 *T. R.* 456.

By bill.

And it may also be put in, where the defendant is in custody, even after final judgment, before he is charged in execution. *Hill v. Stanton*, *H.* 55 *G.* III. K. B. 1 *Tidd*, 271. 2 *Marsh.* 374.

By original.

By bill four days after the return-day are allowed for putting in bail above, exclusively of the return-day. *R. G. M.* 8 *Ann.*

If the action be by original, four days after the *quarto die post*, or eight days after the return. *Frampton v. Barber*, 4 *T. R.* 377. If Sunday be the last day, defendant has all Monday. *Studley v. Sturt*, 2 *Str.* 782, and other cases there mentioned.

In the country, K. B. By bill.

In the country by bill; six days, exclusive, in full term are allowed. *R. M.* 8 *Ann.* K. B. *E.* 11 *W.* III. *r.* 2. K. B.

By original.

In the country, by original; ten days after the return of the writ, or six days after the *quarto die post*. *Imp.* K. B. 619, but who cites no authority applicable only to proceeding by original.

May be put in on a *dies non juridicus*.

Bail above may be put in on a *dies non juridicus*. *Baddely v. Adams*, 5 *T. R.* 170. Same practice C. P.

Within what time in town and country, C. P.

In C. P. in town, the time is the same as by original in the King's Bench on the first return; but if in the country, the time is eight days after the *quarto die post*, if on the first return. *Rolfe v. Steele*, 2 *H. Bl.* 276. If on any other return, then in eight days after the return, or in four days after the *quarto die post*.

Collision of authorities as to times for putting in bail, and transmission of bail-piece.

The general practice as to time for putting in special bail both in town and country, and also as to transmission of bail piece from the country, is much regulated by *R. T.* 8 *W.* III. *r.* 3. *c.* 5. *R. M.* 8 *Ann.* *R. R.* *H.* 6. and *M.* 13 *G.* I. *r.* 2. and *R. M.* 6 *G.* II. *r.* 1. C. P., but as these rules have become modified by, and subjected to, the practice as defined or limited by decided cases, it does not appear to be expedient to advert, unless incidentally, farther to the rules. *R.* 10 *G.* II. *r.* 2, although subsequent in date to the rules just mentioned in practice, is entirely superseded by *R. M.* 8 *Ann.* *r.* 1. *Rules and Orders*, K. B. 281, n. Some embarrassment has occurred from the confounding the time for transmitting the bail piece with that for filing it; but much of the difficulty, if there be any, will be obviated by adverting to the time when the bail shall have been put in, in the country, and when the bail piece must be filed in town; bearing in mind this distinction, the rules are quite clear and intelligible.

It must be understood that the times of putting in, filing, and giving notice of bail in country causes, do not refer to the period when the bail is to be taken before the commissioner; but to the period of the bail-piece being duly and actually filed with one of the judges within the time mentioned, viz. six days by bill, ten days by original, or the bail-bond may be assigned. *Rules and Orders*, K. B. 283, n.

Bail in country causes, how time reckoned.

The bail-piece is to be transmitted from the country, if bail be taken in vacation, and within forty miles of London, in eight days after the caption; if above that distance, in fifteen days after the caption.

As to transmission of bail-piece.

But rule T. 8 W. III. as to the transmission of the bail-piece, does not influence the due filing of the bail-piece, which must be on or before the sixth day, exclusive, after the return of the writ.

The bail must be put in in the proper court and with the proper officer; but where defendant was arrested in K. B., and removed by *habeas corpus* to C. P. he may put in and justify bail in either court. *Knowles and al. v. Reading*, 1 B. & P. 311.

In what court, and with whom bail to be put in.

The bail must be put in with the filazer of the county whence the *testatum* issued; or an attachment may issue. *Clempson v. Knox*, 2 B. & P. 516; *aliter* if it appear in the margin of the bail-piece, whence the *testatum* issued. *The King v. The Sheriff of Middlesex*, 3 M. & S. 532.

If the bail be taken before a judge of the assize, no affidavit of the caption is necessary; the clerk keeps the bail-piece and enters the same in the book at chambers on his return to town. See PRACTICAL DIRECTIONS, *post*.

When no affidavit of caption necessary.

If time be required to put in bail a summons may be taken out, and an order for that purpose will be made on terms of the plaintiff's being put in the same state as he would have been in had bail been duly put in.

Time to put in bail will be granted on terms.

But a summons is no stay of proceedings, and therefore it should be taken out previously to the expiration of the time for putting in bail. And it has been held, that where a rule *nisi* had been obtained for another purpose, and that in the mean time proceedings be stayed, the time for putting in bail was also suspended. *Swayne v. Crammond*, 4 T. R. 176.

Observation.

Formerly the defendant's attorney was required to give notice of bail in K. B. to the plaintiff's attorney before it was put in. *R. M. 7 Jac. I. K. B.*, and the plaintiff's attorney, on such notice being given to him, was obliged to attend before a judge to accept of or except to the bail. *R. M. 21 Car. I. K. B.* But notice of bail is not now given until after it is put in, and although it should regularly be given before the time for putting in bail is expired, yet if it be not given in time, the plaintiff cannot regularly take an assignment of the bail bond. *Per cur. M. 44 G. III. K. B. 1 Tidd*, 278.

Bail above cannot be considered as duly put in, unless due notice, properly entitled, with the names of the parties in the cause, *Lofft*, 237, be given to the plaintiff's attorney, containing names of the bail, their addition, trade, and place of abode, truly,

Of the notice of bail put in, or to justify, what it should contain.

accurately, and minutely described. 11 *Mod.* 2. *Lofft*, 72. 187. 194. 1 *Chit. R.* 88.

As to name.

Misnomer in recognizance and notice, *e. g.* Frances for Francis, *Anon.* 1 *J. B. Moore*, 126. So christian names of bail must be inserted in notice of justification as well as in that of bail put in. *Taylor v. Halliburton*, 1 *Chit. R.* 494, (n.) So where christian name specified in notice of justification varies from that specified in notice of bail put in. 1 *Chit. R.* 494. So where notice specified Lloyd with Ll. and the affidavit with L. *Id. ib.*

As to addition,
where held good.

See — *v. Costar*, 5 *Taunt.* 554 where gentleman, for a clerk in the custom-house held good, so for a school-master. *Anon.* 1 *Chit. R.* 494. n. And where the deponent was described as agent for the plaintiff instead of agent for the defendant, the affidavit was allowed to pass conditionally. *Id.* 495. n.

As to addition,
where held bad.

Where gentleman, instead of a baker. *Wood v. Chadwick*, 2 *Taunt.* 173, held bad. So where in affidavit the bail was named generally, and in the bail-piece was called the younger. — *v. Meller*, 1 *Marsh.* 386. Housekeeper, where the father turned out to be occupier. *Colman v. Roberts*, 1 *Chit. R.* 88. So in general the notice should contain an addition as well as a name. *Id.* 351. So shopkeeper, and where in a previous notice he had been described as a grocer, and there were other circumstances of suspicion. *Id.* 494. n. So, gentleman for a servant. *Id. ib.*

Notice, as to
residence of bail.

The fact of residence, if ground of objection, must be verified by affidavit; the court not taking judicial notice of the size of the place. — *v. Costar*, 5 *Taunt.* 554.

Further time is in general allowed to justify when there is any defect in the notice of bail or justification. *Lofft*, 72. 187. *Per cur. M.* 25 G. III. K. B. And see 1 *Chit. R.* 2. (b), 492, 493. 351. 1 *Tidd*, 290, 91, 7.

As to residence,
where held good.

Although a bail did not reside in the house wherein described. *Hemming v. Plenty*, 1 *J. B. Moore*, 529. So, although described of Lancaster generally, good, by reason that plaintiff had time sufficient to enquire. *Id. ib.* So in Cannon Street Road, nearly a mile in length, without expressing any number; by reason that plaintiff had found the bail and served him with process. *Id.* 503. And see 6 *J. B. Moore*, 332, cited *infra*. So, description where he carries on business, though he reside elsewhere. *Weddall v. Berger*, 1 *B. & P.* 325.

As to residence,
where bad.

Residing at Liverpool too general. *Jackson's bail*, 1 *Chit. R.* 492. So residing at Leeds, Lancaster, Leicester, &c. *Id. ib.* So at Clapham. *Rickman v. Hawes*, 5 *Taunt.* 173; but "Clapham" is sufficient for "Clapham Road." *Presse v. Gibson*, 6 *J. B. Moore*, 332. So Walworth generally. 1 *Chit. R.* 493. So where described of three different places in three different notices. *Porter's bail. Id.*

"Leeds" is too general, although the residence were found; but time granted to amend notice, and for inquiry into sufficiency. *Baxter's bail*, 6 *J. B. Moore*, 44.

It is too general to describe bail about to justify by affidavit as "of the town and county of the town of Nottingham;" the street in which they resided should have been inserted in the notice. *Anon.* 3 *J. B. Moore*, 318.

A mistake in the number of the house in which the bail resides, is a ground of rejection. *Per cur. H. 55 G. III. K. B. 1 Chit. R. 493. n. 1 Tidd, 289.*

It is a rule in K. B., that "when a motion is made for further time to justify bail, it must be supported by an affidavit of the special facts alleged in excuse of the bail not attending at the time mentioned in the notice of justification; or in case further time be given upon suggestion of counsel, then the bail shall not be permitted afterwards to justify, unless at the given time such an affidavit be produced as before described. *R. M. 36 G. III. K. B. 1 Tidd, 297.*

Motion for further time, how supported.

Where notice cannot be served at an attorney's office, it may be stuck up at the K. B. office, and a copy put through the door of the attorney's chambers. *Anon. 1 Chit. R. 294.*

Service of notice of bail, where good.

But affidavit of service by leaving it at chambers of plaintiff's attorney, insufficient where no acknowledgment of receipt. *Jones's bail. Id. ib.*

Where bad.

The bail may be accepted, in which case the bail-piece is filed with the signer of the writs, or if by original in C. P. it remains with the filazer.

Bail may be accepted.

The purpose of the exception is to call upon the bail duly to justify by swearing themselves severally to be housekeepers, and after their own debts paid are worth double the sum for which the defendant was arrested.

Purpose of exception.

If the plaintiffs take an assignment of the bail bond, and the bail to the sheriff afterwards become bail above, they cannot be excepted against in this court. *Richardson K. B. 140*; but then the fact of their being bail to the sheriff should be mentioned in the notice of bail having been put in. If the exception shall have been taken *before* the assignment, such bail must justify. *Hill v. Jones, 11 East, 321.*

Assignment of bail bond precludes exception to bail to sheriff K. B.

The bail above being put in and notice duly given, the attorney for the plaintiff usually *excepts* thereto, (see PRACTICAL DIRECTIONS) but such exceptions must be entered within twenty days after notice of such bail, or it is void. *R. G. M. 8 Ann.* but if the last of the twenty days be on a Sunday, exception may be entered, and notice given on the Monday. *Oldham v. Burrell, 7 T. R. 26.* And however irregularly the bail may have been put in they must be excepted to, or they will be considered as bail. *Higgins v. Bambridge, Bar. 81.*

Within what time exception to be entered.

Entering the exception without giving notice is ill, and both must be in writing. *Satchwell v. Lawes, Bar. 88. Goswell v. Hunt, Id. 101. R. G. E. 5 G. II.*

Exception and notice to be in writing.

Notice of exception to bail entitled in a wrong court is a nullity. *Anon. 1 Chit. R. 375.*

Attachment against the sheriff was set aside, on the ground that the notice of exception to bail was not entitled in the cause, though the notice was served upon the defendant's attorney at the same time with the declaration. *The King v. Middlesex (Sheriff of), Id. 741*; but if a sheriff's officer be put in as bail, the plaintiff must except to the bail, and cannot proceed as if the matter was a mere nullity. *Id. 713.*

As to waiver.

If defendant's bail, without written notice of exception, proceed to justify, any irregularity from want of such notice of exception by the plaintiff is waived by the defendant; but without written notice of exception to the bail, plaintiff cannot proceed to rule the sheriff to bring in the body. *Cohn v. Davis*, 1 *H. Bl.* 80. *Rogers v. Mapleback*, *Id.* 106; and, as above mentioned, if bail to the sheriff be put in above, and exception taken *before* an assignment of the bail bond, they are bound to justify notwithstanding such assignment. *Hill v. Jones*, 11 *East*, 321.

Exception to bail where plaintiff took an assignment of the bail bond, and afterwards gave notice of exception to the bail without entering it: held, that plaintiff's irregularity in not entering an exception, was not waived by defendant's having given two notices of justification, under one of which the bail justified; and therefore held that proceedings should be stayed, but the bail bond was not to be delivered up to be cancelled. *Hodson v. Garrett*, 1 *Chit. R.* 174.

In C.P. notice of justification of bail is a waiver as between the parties, of a neglect to give notice of an exception, though it is not a waiver so as to support the rule to bring in the body. *Id. ib.*

The plaintiff may also waive his right of excepting to the bail by delivering a declaration *in chief*, or by such an act before bail be put in he may waive bail altogether; or if put in, he thereby waives excepting to them, or if after exception, and before justification, he so delivers a declaration in chief, he waives the justification, and virtually it should seem that he loses the bail altogether; and in either of these cases he must be content to take the bail whether sufficient or insufficient. 1 *Sel.* 156; or if waiver of justification take place after exception entered, he loses the bail. See *Gould v. Holmstrom*, 7 *East*, 580. *Humphrey v. Leite*, 4 *Burr.* 2107. *Tubb v. Tubb* therein cited, *Sayer R.* 58. S. C. In like manner, previously to either of these stages of putting in, excepting to, or justifying bail, he waives all right of bail, exception, and justification by demanding or accepting plea. *Lister v. Wainhouse*, *Bar.* 92. But see *The King v. The Sheriffs of London*, 1 *D. & R.* 163, where it was held, that in case the defendant were under terms which he did not fulfil, demand of pleas might not operate a waiver.

So by demanding
or accepting plea.

As to notice of
justification.

Before bail are permitted to justify, it must appear that due notice of justification has been given. — *v. Marshall*, 1 *Marsh.* 322.

Notice of justifi-
cation, what it
should contain.

In case of exception to the bail already put in, the notice of justification needs not again describe them. *England v. Kerwan*, 1 *B. & P.* 335. Although notice of such bail having been put in shall not before have been given. *Bigg v. Dick*, 1 *Taunt.* 17. *Pierson v. Willement*, *Id.* 18. n. And where description is necessary, it must be accurate. Notice of L. M.'s bail held insufficient for bail of L. M. the *younger*. 1 *Chit. R.* 88.

And where defendant is a prisoner, notice of justification may be given by new attorney, without an order for changing the attorney. *Keys v. Tavernier*, *Id.* 291; and see *The King v. London (Sheriffs of)*, *Id.* 329, and note.

If there be due notice of exception being entered in the vacation, the notice to justify bail for the first four days in the following term must be served within four days from the notice of exception. *Millson v. King*, 9 *East*, 434. It may seem otherwise in C. P. that is, that two days notice is sufficient in any case. *Fowles v. Grosvenor*, *Bar.* 101. When to be given.

But where bail was excepted to in vacation, and the defendant gave four days notice of justification for the first day of the term, but on the 19th January gave notice for justifying added bail: Held, that the latter bail might justify. *Woodroffe v. Oldfield*, 1 *D. & R.* 7.

In K. B. if the same bail justify, notice for the next day is good; but in case of fresh bail, whether one or both, two days, or notice on Tuesday for Thursday, is necessary. *Wright v. Ley*, *H.* 15 *G.* III. K. B. 1 *Tidd*, 283; and it may seem that notice of justification must be given for a *dies non juridicus*, provided that be the last of the number of days for which notice of justification is to be given, but then the practitioner must understand that the bail will justify of course the following day. By Master Foster, cited *Ib.* Notice as to time, K. B.

If the fourth day for perfecting bail be the last day of term, and it be not done before the rising of the court on that day, an assignment of the bail bond in the evening is regular. *Dent v. Weston*, 8 *T. R.* 4.

In C. P. the notice for the Thursday must be given on the Tuesday, whether the same or fresh bail justify. *Teale v. Cheshire*, *Bar.* 82. *Elton v. Manwaring*, *Id.* 88. *Nation v. Barrett*, 2 *B. & P.* 30; so that one clear day, and that not Sunday, intervene, *Id.* *Gregory v. Reeves*, *Bar.* 303. As to time, C. P.

Service must be made in K. B. before ten at night; in C. P. before nine. 1 *Chit. R.* 77. n.

Notice of justifying bail in person must be served before eleven o'clock in the forenoon of the day in which the notice must be served, except in case of an order for further time, when the notice may be served before three in the afternoon of the same day on which the order is granted, and the affidavit of service must specify that it was so served. *R. T.* 59 *G.* III. 1 *Chit. R.* 756.

A continuance of notice of bail, where time was not given by the court, need not be served before three o'clock, as specified in the rule. *M. T.* 60 *G.* III. *Williams v. Taylor*, 5 *J. B. Moore*, 472.

Two days notice of justification must be given in the case of added bail, and therefore where notice was given of Monday for Tuesday, (by mistake for Wednesday), and on Wednesday notice was given for Thursday, the bail rejected. *Morgan's bail*, 1 *Chit. R.* 308. *Per cur. M.* 21 *G.* III. K. B. 1 *Tidd*, 283. *Millson v. King*, 9 *East*, 434.

Sunday is not reckoned a day for the purpose of giving notice to justify in the case of added bail, therefore notice of added bail on Saturday for Monday is not sufficient. Case of *Overton's bail*, *M.* 26 *G.* III. K. B. 1 *Tidd*, 283. *Imp. K. B.* 199, 200. *Gregory v. Reeves*, *Barnes*, 303.

BAIL, *Above*; Notice of justification; Adding, &c. CASES.

What good service, or not.

In K. B., one day notice is sufficient, where bail already put in intend to justify; but *aliter*, in C. P. Morgan's bail, 1 *Chit. R.* 308. n.

Service of notice of justification by leaving it at chamber of plaintiff's attorney, no person being therein, is bad; but a subsequent acknowledgment will make the service sufficient. Saunders' bail, *Id.* 77.

Notice was served by leaving it at the office of plaintiff's attorney, who returned it the next day, saying, he should not accept the notice, because he had taken an assignment of the bail bond; this acknowledgment was held sufficient. Bailey v. Davy, *Id.* 77. n.

Service with any person belonging to place entered in master's book, as residence of attorney, held sufficient. *Id. ib.*

Notice of justification must be personally served on plaintiff's attorney, or clerk or servant at office, and affidavit that door was shut, and notice left before ten at night, not sufficient. Fowler's bail, *Id.* 78. S. P. and endeavour to obtain an acknowledgment, held insufficient. Hall's bail, *Id.* 79.

Affidavit of service of notice of justification, by leaving it at an attorney's office, and stating acknowledgment of receipt, but not shewing by whom, not sufficient; but bail allowed to justify conditionally. Jameson's bail, *Id.* 100.

Where bail are rejected, on account of the insufficiency of one, the bail-piece becomes a nullity, and therefore the notice should be for putting in and justifying bail, and not of adding bail. 1 *B. & A.* 704.

Bail may be added.

If the bail already put in shall, either from insufficiency or from other cause, be unable to *justify*, other bail may be *added*: the added bail must justify at all events without any further exception, and therefore it is usual to give notice of bail *having been* added and justifying at the same time; the bail must be added previously to the notice of justification. *R. G. M.* 18 G. III. C. P. Collier v. Godfrey, 1 *H. Bl.* 291. See also Gregory v. Gurdon, *Bar.* 74. and see 1 *B. & A.* 704; but by *R. G. M.* 37 G. III. 1 *B. & P.* 660. bail may justify in court, though they did not actually become bail before the notice of justification was delivered.

Bail may on their own motion justify.

Where the defendant refused to move that his bail might justify, till they had paid certain costs, the court permitted them to justify on their own motion. Haggett v. Argent, 2 *Marsh.* 365.

Bail below may put in bail above, or may justify by their own attorney, without an order for changing the attorney. The King v. The Sheriffs of London, 1 *Chit. R.* 291. 329. and n.

And bail may, on giving the requisite notice, justify at any time before execution. Todd v. Etherington, 2 *Marsh.* 374, although final judgment may have been signed. *Id. ib.*

When to justify.

Bail must justify within *four days after* notice of exception, if there are four days of the term remaining; if not, then on the *first* day of the following term, if it be not intended that the bail, of whom notice shall have been so given, should justify, but others to be added; it seems that two days notice of such added bail will entitle them to justify. Hone v. Barker, 1 *Chit. R.* 4. And it does not appear that the bail are bound to justify on the day mentioned in the notice—the defendant's attorney may continue the

notice to the next day, if the same bail; if other bail he may give two days notice, if there be time.

Justification of bail now takes place before one judge in court only, and not as formerly in the court of K. B. collectively.

Court for justification of bail.

The alteration was made by stat. 57 G. III. c. 11, which, after reciting, amongst other things, that the court of K. B. at Westminster, by reason of the great increase of business therein, had of late been much occupied during term in the adding and justifying special bail, whereby other business of great public concern had been much obstructed and delayed, and that the same inconvenience was likely still to continue, unless some remedy were provided for the same, enacts, that any one of the judges of the court of K. B. at Westminster, when occasion shall so require, to set apart from the other judges of the same court, in some place in or near to Westminster-hall, for the business of adding and justifying special bail in causes depending in the same court, whilst others of the judges of the same court are at the same time proceeding in the dispatch of other business of the same court, in banc, in its usual place of sitting for that purpose, in Westminster-hall; and that the proceedings so had by and before such one of the judges so sitting apart for those purposes, shall be as good and effectual as if the same were had before the court assembled and sitting as usual in its ordinary place of sitting in Westminster-hall.

Stat. 57 Geo. III. c. 11.

Bail permitted to justify at the rising of the court before the last day of term. *Hopper v. Jacobs*, 8 *Taunt.* 56.

If a defendant change his attorney without leave, and give notice of new bail, the plaintiff may prevent their justification. *Hill v. Hill*, 6 *Taunt.* 592.

Where attorney changed.

Justification is the deposing on oath, or affirming if a quaker, by bail to the effect above stated, when adverting to the purpose of exception, *page 173, ante*.

Justification, what.

The usual questions put to a person tendered for bail, relate to his being a house-keeper, and to his being worth double the sum sworn to, after all his just debts shall be paid; and if he answer in the affirmative, and be otherwise unopposed, he will be accepted. Bail was permitted to justify as tenant by the curtesy of lands in the *Isle of Man*, without affidavit or other evidence, that the law of tenancy by curtesy prevails there. *Tomsey v. Napier*, 8 *Taunt.* 148. But it often occurs that the property of which he may depose himself to be possessed, is abroad, out of the reach of the British courts, *e. g.* in *Jamaica*. And herein the practice of K. B. and C. P. have differed. K. B. rejected, *Boddy v. Leland*, 4 *Burr.* 2526, and C. P. admitting bail, whose property, although sufficient, may be out of such jurisdiction. *Smith v. Scandrett*, 1 *Bla.* 444. *Christie v. Fillcule*, 2 *Id.* 1323. especially where the defendant is a foreigner also. *Placitum* of last case.

Who, as to property, may justify, or not.

But where the property was partly cash and partly freehold in Gibraltar, the bail was admitted in K. B. *Beardmore and others v. Phillips*, 4 *M. & S.* 173. *Graham v. Anderson*, *Id.* 371. *acc.* So where property was on its way from abroad, and daily expected, the bill of lading having been received. *Welshford's bail*, 1 *Chit. R.* 286. n. Yet if it had appeared that the whole pro-

perty was abroad, it seems that such bail would have been rejected. *Bayley, J.*, S. C. *Levy's case*, 1 *Chit. R.* 285. Yet *semble*, that a British subject, resident here, although his property be abroad, may justify. *Id.* 286. n.

Where one of the bail was a *Portuguese*, and owned a ship which had for two years before traded between *London* and *Portugal*, and was then gone to *Cadiz*, from whence she was expected to return, and was insured in *London*, the court of K. B. permitted the bail to justify although he did not swear to any effects in *England*. *Colson v. Carhody*, T. 22 G. III. K. B. And see the case of *Welshford's bail*, M. 57 G. III. K. B. 1 *Tidd*, 295. 1 *Chit. R.* 286. n.

A person resident in *England*, was also in that court (K. B.) admitted to be bail in respect of mortgage money secured on an estate in *Ireland*. *Per cur. M.* 42 G. III. K. B.; but see 1 *Sel. Pr.* 161, where it is said, that property in *Scotland* is not sufficient, because it is not liable to the process of our courts. 1 *Tidd*, 295.

So although the bail be indemnified by the officer. *Chick's bail*, 1 *Chit. R.* 714. n., or by a third person. *Neat v. Allen*, 1 *B. & P.* 21.

So, where it appeared, after bail had justified, that money had been given to one of them for his trouble and loss of time in coming up to justify, the court did not set aside the allowance, but imposed upon the defendant the terms of producing an affidavit of merits, bringing the sum sworn to into court, and taking short notice of trial. *Wyllie v. Jones*, 2 *D. & R.* 253.

Bail cannot be questioned after they have justified. *Hawkins v. Wilson*, 5 *Taunt.* 666. And mistake of counsel in not opposing them when the name is called over, is not a ground for requiring the bail to come up again. *Butler's bail*, 1 *Chit. R.* 83.

But when bail had been permitted to justify without opposition, K. B. set aside the rule for allowance of the bail, on payment of the costs of the justification. *Bosanquet v. Simpson*, E. 42 G. III. K. B. 1 *Tidd*, 459.

But the Exchequer would not set aside allowance of bail obtained after an action against the sheriff for an escape, though no bail bond had been taken nor bail above put in in time where the defendant had been rendered on the day of the return of the rule to bring in the body. *Morley v. Cole*, 1 *Price*, 103.

Bankruptcy after certificate obtained is not a ground of rejection. *Smith v. Roberts*, 1 *Chit. R.* 9.

It is no objection to bail that he is one of the indorsers of the bill of exchange on which the action is brought. *Mitchell's bail*, *Stevens's bail*, *Ib.* 305.

And in bail by affidavit in K. B., it need not be stated in the affidavit of justification that they are worth double the debt sworn to, in addition to their liability in other causes. *Stevens's bail. Id. ib.* *Attwood v. Emery, Id. ib.*

Also *semble* that this is unnecessary in C. P. *Reed v. Court-foot, Id. ib.*

Aliter in Exchequer where affidavit must state that bail are sufficient for all the actions. *Anon. Id. ib.*

Where indemnified.

Where gratuity given.

When cannot be questioned again, &c.

Where justification set aside on costs.

Where not.

Personal objections or not.

What needs not be stated in affidavit.

If the bail be justified within the four days from the ruling, the sheriff to bring in the body, proceedings upon the bail bond previous to the justification, will be set aside. *Wright v. Walker*, 3 B. & P. 564.

The first day is reckoned exclusive, and the last inclusively; and if an attachment shall have been obtained on the fourth day the court will set it aside without first calling on the defendant to justify bail. *Maycock v. Solyman*, 1 New R. 139. If Sunday be the last day of the four, Monday will be in time. *North v. Evans*, 2 H. Bl. 35. How computed.

They cannot justify after expiration of the rule to bring in the body. *Overton's case*, Imp. 169; and if they do not justify pursuant to notice, the bail bond may be assigned, nor can principal be surrendered. *Hardwicke v. Black*, 7 T. R. 297.

Further time is granted for justification; but care should be taken that the application be in time to prevent the issuing of an attachment. 1 Sel. 157. And a judge's summons for further time returnable before the original time has expired, operates as a stay of proceedings. *Redford v. Edie*, 6 Taunt. 240. Where further time for justification granted.

And see *R. M.* 36 G. III. page 175, *ante*. In case of bail by affidavit, and where the plaintiff having sworn that the bail was a prisoner for debt, time was given to answer, it was held, that the defendant could not give notice of, and justify fresh bail before the affidavit was answered. 1 Chit. R. 334.

So an affidavit for further time to justify, on the ground that bail cannot attend, must state that the party had consented to become bail. *T.* 1813, *per Bayley*, J. 1 Chit. R. 2. And see *Dixon v. Clarke*, *Id.* 3.

If a rule *nisi* hath been obtained to set aside proceedings for any irregularity, and that proceedings be stayed in the mean time, of course the time for putting in and justifying bail is suspended. *Swayne v. Crammond*, 4 T. R. 176.

If the defendant be allowed to justify after the regular time, pursuant to his notice, the costs of preparing to move for an attachment must be paid. *Jarrett v. Creasy*, 3 B. & P. 633; so though he surrender. *The King, &c. in Irwin v. Hogg*, 1 Taunt. 56. The costs must also be paid by a prisoner where several notices of justification have been given. S. C. n. Also where only one notice. *Mitchell v. Claridge*, *Id.*

Bail not attending, defect or mistake in notice, are grounds upon which the courts have allowed further time to justify; but insufficiency is a ground of refusal of further time. *Lofft*, 72. 187. *Per cur.* *T.* 24 G. III. 1 Tidd, 298. 1 Sel. 159.

Time given to correct mistakes in affidavit of service of notice of justification, where bail not opposed. *Hayward's bail*, 1 Chit. R. 1. So, to correct error in notice of justification, notice of bail, or jurat of bail piece. *Id.* 2. n. So four days time given to correct mistake in bail piece, which omitted to state that bail was taken before a commissioner. *Simmons's bail*, *Id.* 9. So to correct jurat of bail piece in place where sworn. *Simmons v. Morgan*, *Id.* 10. And see *Webster's bail*, *Id.* *ib.*

So, time allowed to enquire where bail told plaintiff he would not justify, *Id.* 289.

Affidavit on motion for time.

Motion for time to justify must be supported by affidavit of fact, in excuse of bail not attending. 1 *Chit. R.* 2. n. And it must state consent of parties to become bail. *Id.* 2. n.; and that deponent believes him competent. West's bail, *Id.* 292.

So, where property insufficient for two actions. Varden v. Wilson, *Id.* 287.

So, where affidavit of justification did not state the degree of the bail. *Anon. Id.* 292.

So for defect in jurat, or trifling misnomer in notice, &c. *Id.* 495, and 351. n.

So, where in bail by affidavit, the names of the bail were omitted in the notice of justification, through neglect of agent in country, two days time were given, the omission not having been made for the purpose of delay. Jeffry's bail, *Id.* 351.

But leave to put in fresh bail was granted where plaintiff had been allowed time to enquire into their sufficiency. *Anon. Id.* 354. n.

So, where the original bail were attornies clerks, and an exception was taken to the added bail on that ground, time to put in and justify fresh bail was given. Hodges v. Meek, 3 *J. B. Moore*, 240. 1 *Tidd*, 271. So where, after consenting to be bail, they become insolvent. Dixon v. Clarke, 1 *Chit. R.* 3, 4. Ayton's bail, *Id.*; or by subsequent bankruptcy or insolvency, *Id.* 2. n.; *Anon. Id.* 110. or ceasing to be house-keepers. *Id.* 6.

Where the bail omitted to attend to justify, defendant's attorney gave another notice in the C. P. for the next day, and on payment of the costs of the first attendance the court allowed the justification to take place. M'Cormick v. Foulger, *M.* 33 G. III. *Imp. C. P.* 124.

Where time refused.

Where court gave him till a particular day to add and justify bail, and the bail did not attend on that day, he cannot justify on a subsequent day without a fresh rule for that purpose. Carter's bail, 1 *Chit. R.* 42.

When bail offer themselves, and are rejected on account of some personal insufficiency existing at the time they were put in, as by their being then attornies, bankrupts, or insolvent debtors, or by their not being then house-keepers, &c. the court will seldom allow time to add and justify others. *Per cur. T.* 24 G. III. K. B. 1 *Chit. R.* 2. (b), 1 *Tidd*, 298.

It is a rule never to allow time to justify bail in error. *Per Bayley*, J. E. 55 G. III. K. B. 1 *Tidd*, 298.

Defendant is bound to know the circumstances of his bail; and where notice had been given of one bail who was notoriously not a house-keeper, the court refused time to add and justify another. Hunt v. Haynes, 1 *Chit. R.* 7.

So one of the bail being an attorney, time was refused to add and justify another. George v. Barnsley, *Id.* 8.

So, refused to correct misnomer in notice of justification by *habens corpus*. Rufford's bail, *Id.* 76.

Bail, of whom notice has been given, having been rejected in another cause on the day of which they were to justify, were not offered for justification according to the notice, and on next day defendant applied for time to add and justify, and to stay proceed-

ings against bail below, but the court refused the motion, because the plaintiff could not be aware of such proceeding. *Watson v. Hinton*, 1 *Chit. R.* 290.

In case of bail by *habeas corpus* or writ of error, time to justify not in general allowed for amending defect in notice of bail, or on account of the delay. *Darcy's bail*, and *Atkins's bail*, *Id.* 76. n.

In bail by affidavit, time will not be given to amend a mistake in the jurat, occasioned by the error of the commissioner in the country, unless the defendant produces an affidavit of merits. *Burford v. Holloway*, 2 *D. & R.* 362.

There is some variation in the practice in the two courts as laid down in the books, namely, whether more than two, if more than two, how many will be allowed to be inserted in the notice of justification; it seems from *Lofft. Anon.* 252, and from *Smith v. Trinder*, K. B. cited 1 *Sel.* 169, *Miller v. Jenkin*, cited in *Forr.* 138, more than two have been allowed to justify. In the last-mentioned case it appears, that where the bail were to justify in 4000*l.*, one was allowed to justify in 4000*l.*, and two others in 2000*l.* each; but *aliter*, *Allen v. Keyt*, 2 *Bl.* 1122. And see *Jell v. Douglas*, 1 *Chit. R.* 601. So in the Exchequer. *Pickering v. Kroger*, *Forr.* 138. *Wightwick v. De Tastet*, *Wightw.* 110.

As to number that may be named to justify.

No person having privilege of parliament can be bail. 4 *Taunt.* 249. *Burton v. Atherton*, 2 *Marsh.* 232, *Duncan v. Hill*, 1 *D. & R.* 126; nor an attorney. *R. G. M.* 14 G. II. *Reg.* 1. K. B. *R. M.* 1654. s. 1. And see 1 *Chit. R.* 8; nor a conveyancer engaged in partnership with an attorney of K. B., and sharing in the general profits of the business of the office, though he did not himself practice as an attorney. — *v. Yates*, 1 *D. & R.* 9; nor attorneys' clerks. *Mason v. Caswell*, T. 26 G. III. K. B. *Stoneham v. Pink*, 3 *Price*, 263. *Ritchie v. Gilbert*, 1 *Taunt.* 164. n.; but if bail be added to an attorney, and justify without opposition, the allowance of the bail will not be set aside. *Bell v. Gate*, *Id.* 162; nor his clerk. *Boulogne v. Vautrin*, *Cowp.* 828. S. C. *Doug.* 450. n. *Cornish v. Ross*, 2 *H. Bl.* 350; though not clerk to the defendant's attorney. *Redit v. Broomhead*, 2 *B. & P.* 564. *Cakish v. Ross*, 1 *Taunt.* 164. n.; but it might seem, according to the case of *Redit v. Broomhead*, just mentioned, that in C. P. persons of this description cannot even become bail for the purpose of surrendering the defendant; but if off the roll for six years, attorney may justify. *Anon.* 1 *Chit. R.* 714. n.; and it has since been determined, that an attorney may become bail, though he cannot justify. *Id.* n.

Who may not or may justify.

If bail be put in without any description, one of whom afterwards proves to be a clerk to an attorney, the plaintiff may treat the bail as a nullity. *Fenton v. Ruggles*, 1 *B. & P.* 356. *Wallace v. Arrowsmith*, 2 *B. & P.* 49; but in K. B. the plaintiff must except to such bail, and cannot treat it as a nullity. *The King v. Sheriff of Surrey*, 2 *East*, 181. *Foxall v. Bowerman*, *Id.* 182; nor persons promised to be indemnified by the attorney. *Preston v. Bindley*, M. 24 G. III. cited 1 *Tidd*, 293. K. B. And see *R. H. M.* 24 G. III. K. B. *R. G. H.* 37 G. III. C. P. 1 *B. & P.* 103. n.; but the court in such a case gave time to put in fresh bail.

Who may not or may justify.

Greensill v. Hopley, 1 *B. & P.* 109. n. A servant in the king's household, liable to be called upon to attend the person of his majesty, cannot justify as bail, for his person cannot be taken in execution. *Anon.* 1 *D. & R.* 127. No sheriff's officer, Marshalsea court officer, serjeant at mace, keeper of a prison (but see *Faulkner v. Wise*, 2 *Id.* 150) summoner of juries, &c. nor any other person executing the process of the superior courts. *Hawkins v. Magnall*, *Doug.* 466. *R. G.* 14 *G.* II. *Reg.* 2. *K. B. R. M.* 6 *G.* II. *Reg.* 7. *C. P.* *Bolland v. Pritchard*, 2 *Bl. Rep.* 799; nor turnkey. *Daly v. Brooshoft*, 2 *Brod. & Bing.* 359. 5 *J. B. Moore*, 72. *S. C.* Outlaw, convict of perjury, and who may be asked, whether he has not stood in the pillory for perjury. *King v. Edwards*, 4 *T. R.* 440.

The court will not set aside the justification of bail, on account of perjury subsequently discovered, but will leave the party to his indictment for perjury. *Shee v. Abbott*, 2 *Brod. & Bing.* 619. 5 *J. B. Moore*, 321. *S. C.*

Discharge under insolvent act disqualifies. *Smith v. Roberts*, 1 *Chit. R.* 9. *Curtis v. Smith*, *Id.* 116.

But if a person who by the rules of the court is not permitted to become bail be put into the bail-piece, and not excepted to, the plaintiff in *K. B.* cannot take an assignment of the bail-bond, and proceed upon it as if no bail had been put in. *Thompson v. Roubell*, *E.* 22 *G.* III. *K. B.* cited *Doug.* 466. *The King v. The Sheriff of Surrey*, 2 *East*, 181, *acc.*

Not being a house-keeper, although the plaintiff may waive this objection. *Saggers v. Gordon*, 5 *Taunt.* 174. Bail cannot justify as a house-keeper in respect of a house which he has hired, but which he is prevented from occupying by illness in the family of the late tenant, and time should be obtained. *Bold's bail*, 1 *Chit. R.* 288. So uncertificated bankrupt, and one who has been twice bankrupt without paying 15*s.* in the pound. *Lofft*, 148. 328. 1 *Chit. R.* 9. *Mountain v. Wilkins*, *M.* 21 *G.* III. *K. B.* 1 *Tidd*, 271. 295. 1 *Chit. R.* 293. Not being worth double the sum sworn to after payment of all his debts, except where the sum sworn to is more than 1000*l.* in which case by *R. G.* *M.* 51 *G.* III. it is ordered, that it be sufficient for the bail to justify in 1000*l.* beyond the sum sworn to; and where the same persons are bail in two actions on the same bill of exchange, they are only bound to justify in double the amount of the sum sworn to in each action, and not in double the amount of the sum sworn to in both actions. *Read and others v. Ellis*, 1 *J. B. Moore*, 29. *Same v. Cornfoot*, *Id. ib.* 7 *Taunt.* 324. *S. C.*; or supposing the justification by affidavit in two several actions, the latter affidavit need not particularize the bail's liability on the former action. *Id. ib.* And in *K. B.*, where the same persons are bail in more actions than one, it is sufficient for them to swear in the affidavit of justification in each action, that they are worth double the amount of the sum sworn to in that action, after payment of all their just debts. *Per Grose, J.* after referring to the master. *M.* 42 *G.* III. *K. B.* 1 *Tidd*, 292. 1 *Chit. R.* 305.

And assuming a fictitious name, contrary to statutes 21 *Jac. I.* c. 26. s. 2. and 4 & 5 *W. & M.* c. 4. s. 4. the bail's ignorance of the defendant having been frequently bail without being able or

willing to say how often or for what sums, or in what actions, Rawlins's bail, 1 *Chit. R.* 3. *Id. ib. n.*; and in fact any other suspicious cause which may be adduced and proved to the satisfaction of the court, will be a ground for rejection of the bail. Who may not or may justify.

And the bail, justifying by affidavit, must not swear that they are worth a certain sum exclusive of all their debts, for the more obvious meaning of those words was, that laying all their debts out of the question, they were worth the sum specified. *Horne, suing, &c. v. Carr*, 4 *Taunt.* 704.

If a defendant sued by a wrong name appears and perfects bail by his right name, without identifying himself as the person sued by the other name, the plaintiff may treat the bail as a nullity, and attach the sheriff. *The King v. The Sheriff of Suffolk*, 4 *Taunt.* 818. Or he may, at his option, waive the variation of the defendant's name. *Id. ib.*

Insolvency after notice of justification given. *Dixon v. Clarke*, 1 *Chit. R.* 3, 4. So if after promised to justify. *Ayton's bail*, *Id. ib.*

Where his property is abroad bail cannot justify, *Levy's bail*, *Id.* 285; unless, *semble*, he be a British subject resident here, *Id.* 286; rejected not having paid arrears of king's taxes, although in a condition to pay them, *Lewes v. Thompson*, *Id.* 309; but where such payment was with relation to the bail often postponed by consent of the collector, time was given to pay the arrears, and admitted on production of the receipt for the arrears. Bail occupying tap connected with a tavern, to the landlord of which licence was granted, cannot justify as house-keeper. *Walker's bail*, *Id.* 316; nor where bail occupies every room in a house except one, which is reserved for the landlord, who also pays all taxes, *Id.* 502; nor where bail had underlet a house to a tenant, the bail occupying the first floor, but the landlord would not accept the under-tenant, who paid the rent to the bail, and the bail to the original landlord. *Id. ib.*

Bail have been rejected who did not know the defendant. *Per cur. M.* 26 *G.* III. *K. B.* 1 *Tidd*, 278.

Person once rejected cannot be bail although his circumstances have changed. *Snell's bail*, 1 *Chit. R.* 82. 676. And see *Pickard v. Dobson*, 3 *D. & R.* 5; but see case presently cited.

So bail rejected who had been bail to the sheriff in a former action, and had not been excepted to, his property not being sufficient for both actions; but time allowed. *Varden v. Wilson*, 1 *Chit. R.* 287.

Though it is a general rule, that bail once rejected and entered in the rejected book, stand always rejected; yet where bail had been rejected on a former occasion, merely on the ground of having been indemnified by the defendant's attorney: Held, that the general rule did not apply. — *v. Hallett*, 1 *D. & R.* 488.

Bail who had recently been bankrupt, and obtained his certificate, but did not know whether his estate had paid any dividend, not permitted to justify. *Probatt's bail*, 1 *Chit. R.* 288.

Bail rejected, who could not say whether during the interval of his bankruptcy and certificate, he had or had not justified. *Bennett's bail*, *Id.* 289.

Who may not or
may justify.

Bail rejected, who had compounded with his creditors, and afterwards become bankrupt, and had not paid 15s. in the pound. *Wade's bail*, 1 *Chit. R.* 293.

Living in the verge of the court, although doubted, *C. P. Glead v. Mackay*, 2 *Bl. R.* 456, 7. But see *Sell.* 171, where this, without other suspicious circumstances, held no objection.

Bail, after having passed, may be rejected before the rule for the allowance is drawn up, if sufficient cause be shewn, as if bail are afterwards rejected in another action. *Waterhouse's bail*, 1 *Chit. R.* 307, and see 676.

Bail rejected in K. B., it appearing that one of them had been before rejected in the Palace Court. *Monk's bail*, *Id.* 676.

So allowance of bail may be set aside under circumstances of gross imposition and fraud on part of bail. *Gould v. Berry*, *Id.* 143. and see *Bosanquet v. Simpson*, *E.* 42 *G. III.* K. B. 1 *Tidd*, 259.

Where bail are afterwards rejected in other causes, allowance will be set aside. 1 *Chit. R.* 144.

So also bail by affidavit not allowed to justify on plaintiff's producing an affidavit of declarations they had made of their insufficiency. *Anon. Id.* 676. n.

And if the justification of bail by affidavit be opposed by another affidavit, stating the insolvency of one of the bail, the court will not allow the matters of the latter affidavit to be answered. *Alpin v. Fox*, 5 *J. B. Moore*, 482.

Allowance of
bail.

Supposing bail to have justified, the next step is to get the rule for the allowance, and until such rule be obtained and copy served, proceedings may still be had against the sheriff; and this though the plaintiff himself were present and opposed the bail at the time of the justification. *The King v. Sheriff of Middlesex*, 4 *T. R.* 494; or he be otherwise informed of it. *Holland v. White*, 2 *B. & P.* 341.

Though bail justify by consent at the judge's chambers, the practice of the court requires that a rule for the allowance of bail should, notwithstanding, be served on the plaintiff or his attorney. *Bignold v. Holding*, 2 *D. & R.* 436. *Bignold v. Lee*, 1 *B. & C.* 285. *S. P.*

When allowance
set aside.

And even if rule for the allowance of bail be obtained, and sheriff shall not have taken a bail bond, the same will be set aside to admit the proceeding of an action for an escape. *How v. Lacy*, 1 *Taunt.* 119.

Where not.

But *C. P.* will not set aside allowance of bail, on the ground that they have sworn to a false account of their property without the privity of defendant or his attorney. 1 *Chit. R.* 116. n. 143. n.

And *procedendo* cannot issue after service of the rule for the allowance of bail, on the ground that the plaintiff was called by a wrong name in the notice of bail, but the rule for the allowance should be first set aside. *Id.* 575.

If default shall have been made in putting in bail in time, they must *justify though not excepted to*, or an assignment of the bail bond may be taken and proceeded on. *Turner v. Cary and others*, 7 *East*, 607.

Where a plaintiff sued in person, and his residence was unknown to the defendant, and his servant refused to disclose it, the court ordered that the affixing a notice of allowance of bail, and notice of this rule in the prothonotary's office, should be good service. *Ward v. Northcoate*, 7 *Taunt.* 145. Service of allowance of bail.

Rule for allowance of bail, discharged with costs, to be paid by defendant on affidavit that the bail had perjured himself on his justification, in swearing that an action in which he had been bail had been compromised. *Brown v. Gillies*, 1 *Chit. R.* 373. And where the rule for the allowance had been so discharged, and pending the motion, the plaintiff had proceeded on bail bond, held regular. *Id.* 496, n. Costs incident to justification.

So where bail described himself as having property of great extent, the court directed inquiry to be made, which bail eluded by running away, court would not permit rule for allowance of bail to be entitled of term bail came up to justify, and application was discharged with costs. *Market v. Gordon*, *Id.* 131.

And where an attorney, knowing that bail are insufficient, puts them in and gives notice of justification, he will be personally liable to pay the costs of opposition. *Blundell v. Blundell*, 5 *B. & A.* 533. 1 *D. & R.* 142. *S. C.*

Where several notices of the same bail were given, the court will compel the defendant to pay the costs incurred by the plaintiff in consequence of such notice. *Aldiss v. Burgess*, 3 *B. & A.* 759.

There must be three notices of justification, and two changes of bail to entitle plaintiff to insist on deposit of costs of opposition before bail justify. *Minor v. Sanby*, 1 *Chit. R.* 446. and see *Thompson v. Davis*, *Id.* 658, n.

But costs of prior oppositions not allowed, though there had been three notices of justification, if one of the notices was of bail put in merely for the purpose of a render. *Wilson v. Kinerley*, *Id.*

So although three notices were given of the same bail to justify in vacation before different judges, and the plaintiff had incurred the expence of three oppositions, yet upon their appearing to justify, the court would not compel the payment of the costs of the opposition, as the bail justified, though the court afterwards referred the matter to the master on an application against the attorney for vexatious proceedings. *Sleer v. Smith*, *Id.* 44. 80.

See what follows, as to BAIL. Also ARREST, ATTORNEY, ante; BANKRUPTCY, ESCAPE, EXONERETUR, RECOGNIZANCE, SHERIFF, TROVER, post.

PRACTICAL DIRECTIONS, K. B.

The attorney for the bail to the sheriff, although not the attorney for the defendant, may put in bail above without a judge's order for changing the attorney, and this although the defendant's attorney shall also have given notice of bail. *The King v. Sheriffs of London*, 1 *Chit. R.* 329.

Apply at the sheriff's office for a short copy or abstract of the writ; obtain special bail piece at the stationer's; stamp 2s. 6d.; and at the same As to putting in bail above in town.

Bail piece, Form
No. 1.

time a blank memorandum or warrant to defend, stamp 5s.; write the term, which must be that in which the writ is returnable, at the head, in the same manner as above directed with respect to common bail; except, that instead of merely formal bail of John Doe and Richard Roe, the names, additions, trades, and residences of the bail, very sufficiently described, must be inserted, together with the sum sworn to. See FORM, No. 1.

Fill up the memorandum or warrant to defend at the same time. See tit. MEMORANDUM, *post*.

Take the bail to a judge's chambers, deliver the bail piece with the memorandum to the clerk, who will then address himself to the bail, and mention to them the nature of their undertaking, to which they assent; this is called their entering into a recognizance; pay the clerk in term time 4s., in vacation 1s. more.

By original, the bail must be put in with the filazer K. B., who early in the term is generally in attendance at the judge's chambers; but if not, on request attends for that purpose.

Notice of bail,
Form, No. 2.

The bail are then dismissed, and the attorney's clerk immediately, or the same evening generally, gives notice of the bail above having been put in. See Notice, No. 2, FORMS.

Exception,
Form, No. 3.
Notice of excep-
tion, Form,
No. 4.

If the plaintiff's attorney be dissatisfied with the bail he excepts to them, but he must see that the exception be followed by justification, otherwise he loses the bail. Exception to the bail is made by writing in the book kept at the judge's chambers, where the bail were put into such exception. See No. 3, FORMS, and if the proceedings be by original the exception is entered in the filazer's book: the attorney's clerk gives notice of the exception the same evening. See No. 4, FORM.

This notice of exception calls upon the defendant's attorney to appoint the bail to attend the court, now held at Westminster Hall, 57 G. III. c. 11. punctually before nine in the morning. R. G. T. 35 G. III. R. G. H. 46 G. III. and there, in open court, to justify or swear themselves to be worth double the sum sworn to.

The plaintiff's attorney should see that the recognizance be rightly taken, especially as it has been lately ruled, that the plaintiff pursuing an erroneous recognizance does it at his peril. See *Holt v. Frank*, 1 M. & S. 199. and BAIL, *Proceedings on Recognizance*, *post*.

After exception in term time it has been seen *ubi supra*, that the bail, whether the same, or added, or new bail, must justify in four days after such notice; if notice of exception be given in vacation, or so late that four days do not remain of the term, the bail are to justify on the first day of the subsequent term. R. G. E. T. 5 G. II. but the notice must be given within four days after exception.

Justification must be in open court if within ten miles of Westminster Hall, if more, by affidavit. 1 Sel. 157.

Notice of justifi-
cation, Form,
No. 5.

When the bail purpose to attend, notice must be duly given; if the bail already put in justify Monday for Tuesday, or Saturday for Monday, will be sufficient notice. By R. T. 59 G. III. from and after the last day of Trinity term every notice for justifying bail in person shall be served before eleven o'clock in the forenoon of the day on which according to the present practice, such notice ought to be served. In case of an order of the court for further time, in which case it shall be sufficient to serve the notice before three o'clock in the afternoon of the day of which such order shall be granted. And in all cases aforesaid, the affidavit of service shall specify the time of day at which such notice shall have been served. See FORM, No. 5.

The judge's clerk must be requested to attend with the bail piece, who delivers it to the master; pay clerk 2s. 6d.; if by original the filazer must be requested to attend.

The bail attend the court pursuant to such notice; and they will be permitted to justify at the rising of the court before the last day of term. *Hopper v. Jacobs*, 8 Taunt. 56. The general rule being, that except on the last day of the term, bail must be justified at the sitting of the court. But bail and all papers, &c. must now be ready in court by half past nine in the morning.

Bail on coming up to justify, guilty of gross prevarication may be committed to the custody of the marshal. *Curtis v. Smith*, 1 Chit. R. 116. Their prevarication punished.

The attorney's clerk is ready with an affidavit of the service of the notice of justification usually sworn in court; oath 1s. See FORM, No. 6. Affidavit of service of notice of justification, Form, No. 6.

Indorse on this affidavit "To move to justify bail pursuant to the within notice;" give same to counsel with 10s. 6d. who moves the court that such bail may justify; the bail is sworn to answer truly, and each is accordingly asked whether he is a housekeeper (or freeholder) and worth double the sum sworn to after all his just debts are paid. See observation as to rule of court, page 182, where sum sworn to is more than 1000l. The bail answering in the affirmative, are again dismissed, pay 3s. unless opposed, as hereafter mentioned; the counsel hands up the affidavit, and the clerk of the rules draws up the rule for the allowance of the bail. See FORM, No. 7; pay for same 1s.; serve copy on plaintiff's attorney, and let it be remembered, agreeably to the cases cited above, that the bail are not well put in and completed till this be done; the bail piece is to be obtained from the master's clerk, and duly filed with Messrs. Prevost and Chambre, within twenty days; this is necessarily to be done before a defendant in custody, for want of bail, can be superseded on the same being complete. Rule for allowance of bail, Form, No. 7.

And bail cannot be questioned after they have justified, and mistake of counsel in not opposing them at the time, is not a ground for requiring the bail to come up again. *Butter's bail*, 1 Chit. R. 83.

And though two notices are given by different attorneys of two different sets of bail, and bail put in by the sheriff have already justified, defendant is entitled to have his bail justify, and be allowed. *Wheeler v. Rankin*, 1 Chit. R. 81.

After the exception hath been entered and duly served as above mentioned, it is very usual for the plaintiff's attorney to consent to a justification at chambers, where the bail are appointed to attend as before, and where they are to swear to the same tenor and effect as if they were justifying in open court. Where the parties are really responsible, this is not only a saving of time but is a convenience to all parties. Justification by consent at chambers.

For this purpose an application is made to the plaintiff's attorney, who waives the justification in open court, and thereby the expence of the affidavit of service of the notice of justification, &c. is saved.

The court of K. B. has animadverted upon the taking the 10s. 6d. by the plaintiff's attorney in this case; whether the practice be inveterate I am ignorant.

Hitherto the Practical Directions have been applicable to cases occurring in ordinary course; but it too often happens that bail are proposed who are very incompetent to fulfil that character, in case the defendant fail to discharge the plaintiff's debt. Where this is suspected the plaintiff's attorney on receiving notice of bail put in, causes a careful enquiry to be made in the neighbourhoods described in the notice as to the re- Observation as to where bail suspected.

responsibility, credit, and character of the bail; and having ascertained the circumstances which render such bail objectionable, he excepts as before mentioned, but instead of consenting to a justification at chambers, or agreeing to a justification in open court without opposition, he instructs counsel to oppose them on their attempting to justify in open court.

All suspicious circumstances are detailed in the instructions given to counsel to oppose such bail, and they are very frequently so effectually exposed as to be rejected by the court. In addition to what the bail on being questioned may allege to shew their own incompetency, however unwillingly, the plaintiff may oppose them on affidavit; which affidavit must, however, be read previously to the bail being asked any questions; for when bail are opposed, an affidavit of their insufficiency cannot be produced after questions have been put to them. *Anon.* 1 Chit. R. 374. n.

Affidavit containing general slanderous statements injurious to the character of the bail cannot be received. *Sanderson's bail*, *Id.* 676.

The fee to counsel on opposing bail is half a guinea.

We have also hitherto supposed that the same bail justify who were originally put in, but such bail may have been intended only to be temporary for the purpose of surrendering the principal, or to gain time to procure substantial bail; but on receiving the notice of exception, the defendant's attorney, if he know that the bail already put in cannot duly justify, gives notice of other bail, namely, of one or more bail having been added. No. 8 and 9, FORMS.

Notices of bail
being added.
Forms No. 8 and
9.

Such notice must, as already mentioned, be given two days before the intended justification; thus notice served on Friday for Monday, Sunday not being reckoned a day, or on Monday for Wednesday, will be good notice. And see the cases as to time for notices, &c. ante.

Such bail may be added in the Treasury Chamber on the morning of justification; the judge's clerk, the previous evening, must be requested to attend with the bail piece; pay him 2s. 6d. in order that the same may be delivered to the master, who duly inserts the added bail; pay 2s. for each added bail.

Added bail may also be opposed.

Further time for
justification.

We have seen, pages 173. 179, that further time will be granted for the justification of bail; but it is material to attend to rule M. 36 G. III. page 173, ante.

Where defendant
in custody.

It frequently happens that the defendant is in custody, and to enable him to be discharged on finding good bail, the 43 G. III. c. 46. s. 6. enacts, that any defendant who may be in custody on mesne process issuing out of any of his majesty's courts of record at Westminster or Dublin, after the return of the process may, in vacation only, upon due notice, put in and justify bail before any one of the justices or barons of the court out of which the process shall issue, who may make a rule for the allowance of such bail, and may discharge the defendant by writ of supersedeas in like manner as in term time. Where bail are opposed and rejected, and the defendant is surrendered the next day, new bail may afterwards be justified without paying the costs of the former opposition. *Holward v. Andre*, 1 B. & P. 32; see however page 179, ante; pay for the rule for allowance 8s. 6d., serve copy as before; see FORM OF NOTICE, No. 15. And it should seem that so often as the defendant shall be surrendered in discharge of his bail before execution, so often may he be discharged on putting in and justifying bail, and this by reason that after each surrender there remains no bail in the cause.

WHERE BAIL IS PUT IN IN THE COUNTRY. K. B.

The authorities and cases collected, ante, page 170, will have sufficiently explained the law respecting bail being put in in the country. The Practical Directions will now be subjoined.

The commissioners for taking and receiving recognizances of bail, and for examining the sureties on oath, touching the value of their respective estates, are appointed pursuant to stat. 4 & 5 W. & M. c. 4. and by a clause in the same act, justices of assize on circuit are allowed to take such bail.

By R. G. 8 W. III. s. 4. the commissioners are to keep a book for the entrance of the names of the parties, as in the bail piece; the time of taking the name of the person who shall transmit the same, and the name of the defendant's attorney.

By section 5 of the same rule, plaintiff's attorney is to have access to such book; to except against them within twenty days after the transmission thereof, and notice to the plaintiff or his attorney of the taking the same, and in that case the defendant must either put in better bail, or the cognizors must justify in court, or by affidavit taken before such commissioner or by oath in court, or before a judge of the court; and by R. G. M. 9 G. II. no affidavit sworn before a commissioner for taking affidavits can be read, unless filed and a copy thereof made by the clerk of the rules.

The further general Practical Directions are nearly the same mutatis mutandis, whether before a commissioner in the country or at a judge's chambers; see therefore ante, page 185.

On the recognizance being taken, make the affidavit before a commissioner for taking affidavits in the court, FORM, No. 10; annex the bail piece. And if bail be put in in the country wherein defendant is arrested on a testatum capias, such bail is not a nullity if county from which the testatum issued, appear in the margin of the bail piece. 1 Chit. R. 79. n.

Affidavit of caption, Form No. 10.

The defendant's attorney also immediately causes the affidavit of justification, FORM, No. 11, to be made before the commissioner.

Affidavit of justification, Form No. 11.

N. B. In K. B. if the same persons are bail in other actions, each affidavit needs only state the bail to be worth double the sum sworn in that action; this affidavit, with the affidavit of caption and bail piece annexed, are usually transmitted by the defendant's attorney to his agent, who duly files the bail piece, the affidavit of the caption, and the usual memorandum to defend, with a judge of the court. In term pay 5s., in vacation 1s. more. Give notice thereof, FORM, No. 12.

Notice of bail-piece being filed, Form No. 12.

After these steps, the subsequent exception and justification are also nearly the same as before; the notice of justification must be duly served; see FORM, No. 13.

Notice of justification by affidavit, Form No. 13.

An affidavit of the service of such notice must be duly made; see FORM, No. 6, and proceed as before as to bespeaking bail piece, giving brief to counsel, and therewith, in order that it may be handed to the master, the affidavit of the justification, obtaining rule for the allowance of the bail, and serving copy thereof on plaintiff's agent.

The bail piece in all cases seems to be properly filed of the term in which it is completed. Anon. 1 Salk. 100.

PRACTICAL DIRECTIONS, C. P.

Exclusively of the officers and offices being different, the practice of the court of C. P. varies in some points from that of the court of K. B.;

Office practice,
C. P.

but the general practice *mutatis mutandis*, is so nearly the same, and the decisions of one court are so frequently cited as concurrent authorities in the other, that it would unnecessarily enlarge this work, were a separate detail to be made: it will be sufficient to note shortly the office practice, which may be deemed peculiar to this court.

If arrest be in town, and the writ be returnable the first return of the term, the bail must be put in in four days after the first day of term; if any other return, in four days after the general return day.

If the arrest be in the country, and the writ be returnable the first return of the term, bail must be put in in eight days from the first day of term; and if it be returnable any other return of the term, the bail must be put in in eight days after the general return day. R. G. H. 9 Ann.

In town causes, except in the absence of the filazer, no bail-piece is used in this court; the filazer will attend at the judge's chambers with his book, or if the action be at the suit of an attorney, or other privileged person, the prothonotary's clerk will attend, and take the bail, whose names, with a brief abstract of the writ, similar to the bail pieces in K. B. the defendant's attorney should have ready on a slip of paper; but in the absence of either, it may be taken on producing a true abstract of the writ, names of bail, &c. on a 2s. 6d. stamp parchment; see FORM, No. 14, pay filazer or prothonotary in term 12s. vacation 18s. if taken at the judge's house 3s. 4d. more. By R. G. E. 36 G. III, the defendant shall not be permitted to enter into the recognizance, but the bail shall each of them enter into a recognizance of double the sum sworn to. 1 B. & P. 530. In the following FORMS, C. P. the statement that the defendant (in actions commenced subsequent to that rule) entered into the recognizance must be omitted. It may be here remarked, that where bail is taken under a judge's order in this court, each of the bail is liable to double the sum ordered, as well as double the sum sworn to, in case of affidavit. *Dahl v. Johnson*, 1 B. & P. 205. If the bail were put in in time, no notice was formerly held to be necessary. *Dawkins v. Reed*, 1 H. Bl. 529: but by R. G. E. 49 G. III. 1 Taunt. 616, it is *inter alia* ruled, that in all actions when special bail shall be put in for the defendant, a notice in writing of such bail being so put in shall be forthwith given to the plaintiff's attorney or agent, and that no special bail should be considered as put in until such notice shall have been so given.

In country causes the putting in bail before a commissioner is nearly the same in both courts; pursuant to rule 5 W. & M. it is rather more formal; see FORM, No. 14.

One bail may be put in before the same commissioner at one time, and one at another time. Imp. C. P. 194.

As to transmission of the bail piece, see before, page 170, and also R. G. H. 6 G. I. that is, if within forty miles, in ten days; if more than forty, in twenty days; see observation on this, page 170.

When transmitted, apply to a judge for his allocatur, which is granted on producing the bail piece and the affidavit of the caption; in term pay 6s.; in vacation 12s.; the same must then be filed with the filazer; if at the suit of a privileged person, with the prothonotary, as the case is; pay 6s. R. G. H. 6 G. I. R. G. M. 13 G. I. R. G. M. 6 G. II. but if not transmitted in time, it cannot be filed without leave of the court; R. G. M. 6 G. II. it is usual to file the affidavit of the justification also with the filazer at the same time with filing the bail piece.

A copy of the affidavit of the justification is usually given by the defendant's to the plaintiff's agent.

As to exception to bail in this court, a much more material distinction is to be noticed. Office practice, C. P.

The bail, though bail to the sheriff, may be excepted against at all times, whether after assignment of the bail bond or not. R. G. M. 6 G. II.

The exception in London and Middlesex is to be entered in the filazer's book; in other counties the exception is to be entered under the bail piece filed at the filazer's of the county.

The bail is added with the filazer at the judge's chambers; pay him 7s. 6d.

Bail to be perfected after exception in the times as to term and vacation mentioned before; but it seems that agreeably to the practice K. B. the notice of justification for the following term must be given within four days after the notice of exception, though such notice be given in vacation; see page 172, ante. The practice in C. P. does not, as in K. B., appear to be altered by any decided case. By the practice in that court, that is, in C. P., it is sufficient in all cases to give two days notice previously to justification. Fowles v. Grosvenor, Bar. 101. As to this, quære. It may be safe perhaps, to give the notice of justification for the next term within the four days after exception served.

In this court there must be two days notice of the justification in every case, as Thursday for Saturday, Saturday for Tuesday.

Notice of justification, not as against the sheriff, a waiver of exception; see case cited, page 174, ante.

Waiver in other cases, the same as in K. B.

Justification as in K. B. except that at is always done at Westminster; serjeant 10s. 6d.; and the filazer must be requested to attend with his book, or, in case of a country cause, with the bail piece; pay him 8s. 4d. court fees 11s.; and in this court it is not necessary to enable them to justify, that the bail should have become so previously to the service of the notice of the justification. R. G. M. 37 G. III. C. P. The secondary draws up the rule; pay 6s.; serves copy, and shew the original at the same time.

The justification by consent at chambers, same as K. B. ante, page 187, except that the filazer must attend; pay him 3s. 4d.; pay the judge's clerk 2s.

Since the 43 G. III. c. 48. s. 6. a prisoner in custody on process of this court may be discharged on putting in and justifying bail in vacation at chambers; see ante, page 189.

It should be further noticed that in this court the bail, where bail in other actions, should swear in an affidavit of justification that they are worth double the amount of the debts in all the actions wherein they offer to become bail. Field v. Wainwright, 3 B. & P. 39. And see Jones v. Ripley, 3 Price, 261, whereas K. B. holds it to be sufficient to swear in each action to double the amount of the debt in that action: per Grose, J. after referring to the master. M. 42 G. III. 1 Tidd, 292.

But the oath is not required to this extent where actions are brought against other parties on the same bill or note. Reid v. Cornfoot, 7 Taunt. 324. 1 J. B. Moore, 29. S. C. 1 Chit. R. 306. n.

FORMS.

N. B. These forms *mutatis mutandis* will answer for either court.

No. 1. You (*addressing the bail by their names*) do jointly and severally undertake, that if *C. D.* shall be condemned in this action, at the suit of *A. B.*, *C. D.** shall satisfy the costs and condemnation, or render himself to the custody of the Marshal of the Marshalsea of the court of King's Bench, or you will do it for him. Are you content?

No. 2. You (*addressing the bail by their names*) do severally acknowledge to owe unto *A. B.* the sum of £—— a-piece, to be levied upon your several goods and chattels, lands and tenements, upon condition, that if *C. D.* be condemned in the said action, he shall pay the condemnation, or render himself a prisoner to the Fleet prison for the same; and if he fail so to do, you (*again addressing the bail by their names*) do undertake to do it for him.

No. 3.
Form of special
piece, stamp
2s. 6d.

[Court.]	
—— term, in the —— year of the reign of King George the Fourth.	
<i>Ellenborough and Markham.</i>	
London,† } to wit. }	<i>Richard Roe</i> is delivered to bail on a <i>cepi corpus</i>
to	
<i>Thomas Stiles</i> , of No. 45, Fleet-street, in the city of London, stationer,	
and	
<i>Samuel Stiles</i> , of No. 18, Cheapside, in the said city, bookseller,	
at the suit of	
<i>John Doe.</i>	
Oath } £100 }	
If taken in the country, add here before whom the bail was taken.	} —— defendant's attorney.
—— day of —— } 18——.	

* The recognizance as usually taken is bad English, "He," referring to *A. B.* the immediate antecedent.

† If on a *testatum* special *capias* out of one county into another, insert the first, namely, the county from which

the *testatum* issues. So where *testatum* from London into the County Palatine of Lancaster. Longworth v. Healey, 3 J. B. Moore, 76. And see 1 Chit. R. 79, n.

[Court.] No. 4.
 _____ term, in the _____ year of the reign of King George _____
 the Fourth. Bail piece by
 (County) to wit. C. D. is delivered to bail on a *cepi corpus*, to bill, in town.
 E. F. of _____,
 and
 G. H. of _____,
 Oath, £_____.
 _____, attorney.
 At the suit of A. B.

Taken and acknowledged conditionally,
 at my chambers in Serjeant's Inn,
 Chancery-lane, this _____ day of _____,
 18—, before me.

[Court.] (Title cause.) No. 5.
 Take notice, that special bail was this day put in for the defendant in Notice of special
 this cause before the honourable Mr. Justice _____, at his chambers bail.
 in Serjeant's Inn, Chancery-lane, London, and the names are Thomas
 Stiles, of No. 45, Fleet-street, London, stationer, and Samuel Stiles,
 of No. 18, Cheapside, in the said city, bookseller. Dated this _____
 day of _____, 18—.

Your's, &c.
 _____, attorney for the defendant.
 To Mr. _____, attorney for the plaintiff.

I except against these bail. No. 6.
 _____, plaintiff's attorney. Exception to the
 (Date.) bail.
 N. To be written in the judge's or filazer's book.

[Court.] (Title cause.) No. 7.
 I have excepted against the bail put in for the defendant in this Notice of excep-
 cause. Dated this _____ day of _____, 18—. tion to the bail
 _____, plaintiff's attorney. above.
 To Mr. _____, attorney for the defendant.

[Court.] (Title cause.) No. 8.
 Take notice, that the bail already put in for the defendant in this Notice of justifi-
 cause, and of whom you have had notice, will on _____ next justify cation of bail.
 themselves in open court, Westminster Hall, in the county of Middle-
 sex (if a country cause, say "by affidavit,") as good bail for the said
 defendant. Dated this _____ day of _____, 18—. Your's, &c.
 _____, attorney for defendant.
 To Mr. _____, attorney for the plaintiff.

[Court.] (Title cause.) No. 9.
 _____, clerk to _____, of _____, attorney for the defend- Affidavit of ser-
 ant in this cause, maketh oath and saith, that he did, on the _____ day vice of notice of
 justification.

of _____ instant, personally serve _____, the plaintiff's attorney, with a true copy of the notice hereunto annexed. (Signed)

Sworn, &c.

If the servant of plaintiff's attorney or clerk be served, say "served
"Mr. _____, the plaintiff's attorney in this cause, with a true copy
"of the notice hereunto annexed, by delivering the same to the clerk
"or servant of the said _____, at his house in _____."

No. 10.

Rule for allow-
ance of the bail.

_____ next after _____, in _____ Term.

v. } Upon reading the affidavit of _____, *It is ordered*, that
_____ } the bail put in for the defendants in this cause, who have
_____ } this day justified themselves in court, be allowed, and
the bail-piece filed, on the motion of Mr. _____.

By the court.

No. 11.

Notice of adding
and justifying
bail.

[Court.]

(Title cause.)

Take notice, that _____, of _____, and _____, of _____, will, on _____ next, add themselves to the bail already put in for the defendant in this cause, and at the same time will justify themselves in open court, Westminster Hall, in the county of Middlesex, as good bail for the said defendant. Dated this _____ day of _____, 18—.

Your's, &c.

_____, attorney for defendant.

To Mr. _____, attorney for the plaintiff.

No. 12.

Notice of one bail
to be added and
justified.

[Court.]

(Title cause.)

Take notice, that _____, of _____, will, on _____ next, add himself to the bail already put in for the defendant in this cause, and that he, together with _____, one of the bail already put in for the defendant, and of whom you have had notice, will at the same time justify themselves in open court, Westminster Hall, in the county of Middlesex, as good bail for the said defendant. Dated this _____ day of _____, 18—.

Your's, &c.

_____, attorney for defendant.

To Mr. _____, attorney for the plaintiff.

No. 13.

Special bail
piece taken be-
fore commis-
sioner.

[Court.]

_____ term, in the _____ year of the reign of King George the Fourth.

(County) to wit. C. D. is delivered to bail on a *cepi corpus*, to

E. F. of _____

and

Oath, £_____.

G. H. of _____

At the suit of A. B.

_____, attorney for the
defendants.

Taken and acknowledged conditionally,
this _____ day of _____, 18—,
before me, _____, one of the
Commissioners, &c.

[Court.]

(Title cause.)

No. 14.

_____, of _____, in the county of _____, gentleman,
maketh oath and saith, that the recognizance of the bail (or bail piece)
hereunto annexed, was duly acknowledged by _____, of _____
and _____, of the same place _____, before _____
the commissioner who took the same in this deponent's presence, the
_____ day of _____ last past.

Affidavit of cap-
tion of bail.

Sworn _____

(Signed)

[Court.]

(Title cause.)

No. 15.

_____ of _____, in the county of _____, and _____ of
the same place, _____ bail for the defendant in this cause, severally
make oath and say, and first this deponent _____ for himself saith,
that he is a housekeeper in _____ aforesaid, and that this depo-
nent is worth £ _____ over and above what will pay all his debts.
And this deponent _____ for himself saith, that he is a housekeeper
in _____ aforesaid, and is worth £ _____ over and above what
will pay all his debts.

Affidavit of jus-
tification of bail.

Sworn _____

(Signed)

[Court.]

(Title cause.)

No. 16.

Take notice, that the bail-piece in this cause, with the affidavit of
the due taking thereof, was this day filed with the honourable
Mr. Justice _____, at his chambers in Serjeant's Inn, Chancery-
lane, London. Dated this _____ day of _____, 18—.

Notice given to
plaintiff's agent
on filing bail
piece, &c.

Your's, &c.

_____, agent for the defendant.

To Mr. _____, agent for the plaintiff.

N. B. The names of the bail may be added to the
notice, thus:—" and the names are _____," but
it is in the option of the practitioner to add them
or not.

Same as No. 9, but say " by affidavit."

No. 17.

{ Notice of bail
justifying by affi-
davit.

[Court.]

_____ term, in the _____ year of the reign of King
George the Fourth.

No. 18.

London (ss). Capias against _____ late of _____, at
the suit of _____ for £ _____, upon promises returnable
_____ Affidavit for £ _____.

Form of bail
piece or memo-
randum of bail
for filazer, C. P.

Bail are _____ of _____
and _____
of _____

Taken and acknowledged,
conditionally, at my
chambers in Serjeant's-
Inn, Chancery Lane,
the _____ day of _____, 18—,
before me,

{ Each of the bail bound in £ _____.

_____, Attorney for defendant.*

* Bail are to sign the bail-piece, both in C. P. and Exchequer of Pleas,
but not K. B.

No. 19.

[Court.]

(Title cause.)

Notice of justification of bail for prisoner in vacation.

Take notice, that the bail already put in for the defendant in this cause, and of whom you have had notice, will justify themselves as good bail for the said defendant, on ———, the ——— day of ——— next, at the chambers of the honourable Mr. Justice ——— situate in Chancery-lane, London. Dated this ——— of ———, 18—.

Your's, &c.

———, attorney for the defendant.

To Mr. ———, attorney for the plaintiff.

N. B. Be ready, as in other cases of justification, with an affidavit of service; see No. 9, *ante*, page 193, the order for the allowance of bail is made by the judge, and the clerk of the rules draws up the rule thereon; pay 8s. 6d. and proceed as in other cases.

No. 20.

Bail piece where bail put in before a commissioner in the country, C. P.

} Same as No. 18.

What.

BAIL BOND. A specialty, whereby the defendant, and other persons, usually not less than two, though the sheriff may take one only, 10 Co. 101, become bound to the sheriff in a penalty (generally double the sum sworn to) for the due appearance of such defendant to the legal process therein described, and by which the sheriff hath been commanded to arrest him. The immediate effect of this instrument is the release of the defendant from the obligation he would otherwise be under of going to a prison, or to safe custody.

Its origin; abstract of the stat. 23 H. VI. c. 10.

Sect. 5.

This instrument is directed to be taken by stat. 23 H. VI. c. 10, the preamble of which recites that the king, considering the great perjury, extortion, and oppression, which be and have been in this realm by his sheriffs, under-sheriffs, and their clerks, coroners, stewards of franchises, bailiffs, and keepers of prisons, and other officers in divers counties of this realm, and then by section the 5th enacts, that the said sheriffs and all other officers and ministers aforesaid shall let out of prison all manner of persons by them or any of them arrested, or being in their custody by force of any writ, bill, or warrant in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons having sufficient within the counties where such persons be so let to bail or mainprize to keep their days in such place as the said writs, bills, or warrants shall require; and by section the 7th, it is enacted, that no sheriff nor any of the officers or ministers aforesaid, shall take or cause to be taken or make any obligation for any cause aforesaid, or by colour of their office, but only to themselves, of any person, nor by any person which shall be in their ward by the course of the law, but by the name of their office and upon condition written, that the said prisoners shall appear at the day con-

tained in the said writ, bill, or warrant, and in such places as the said writs, bills, or warrants shall require.

And by section the 8th, if any of the said sheriffs or other officers or ministers aforesaid, take any obligation in other form by colour of their offices it shall be void. Section the 11th enacts, that the sheriff, &c. offending against this act shall lose to the party indamaged or grieved for every offence his treble damages; and also 40*l.*, one half to the king, and one half to the party suing for the same. And by the 14th section it is enacted, that if the said sheriffs return upon any person *cepi corpus* or *reddidit se*, they shall be chargeable to have the bodies of the said persons at the days of the returns of the said writs, bills, or warrants, in such form as they were before the making of the said act. Sect. 8.
Sect. 11.
Sect. 14.

Pursuant to this statute, which is a public statute (though once thought otherwise, *Samuel v. Evans*, 2 *T. R.* 275,) the bail bond to which it gives origin, is become a proceeding of course where a defendant is arrested, or against whom process is taken out. *Haley v. Fitzgerald*, 1 *Str.* 643. Observation.

It seems that a bail bond for the appearance of a party on an attachment out of Chancery, is wholly untouched by this statute. Therefore though the sheriff is not bound to take bail in such case, yet he may recover on a bail bond so taken. *Morris, esq. v. Hayward and others*, 2 *Marsh.* 280. 6 *Taunt.* 569. *S. C.*

The condition of the bail bond given to the sheriff cannot be other than for the due appearance of the defendant, pursuant to the statute, which must be strictly pursued, *Rogers v. Reeves*, 1 *T. R.* 418. What the condition must be.

With some exception, nothing can be a performance of the condition of a bail bond, but putting in bail. *Harrison v. Davies*, 5 *Burr.* 2683. An exception seems to be surrender. *Jones v. Landers*, 6 *T. R.* 754. *Stamper v. Milbourne*, 7 *T. R.* 123. *Hamilton v. Wilson*, 1 *East*, 387. *Maddocks v. Bulcock*, 1 *B. & P.* 326. And how fulfilled.

If the bail be insufficient no action lies against the sheriff. *Grovenor v. Soame*, 6 *Mod.* 122. Where sheriff not liable,

But if he omit to take it, he will, under circumstances, be fixed. As, where a sheriff's officer, on arresting the defendant, took five shillings from him, with a promise to pay the remainder of what was usual at a future day, and allowed him to go at large without taking a bail bond, without the plaintiff's assent, he cannot be surrendered in discharge of his bail; and an attachment having issued against the sheriff for not returning the writ, it cannot be set aside, nor will the court relieve him by allowing him to put in and justify bail. *Collins v. Snuggs*, 6 *J. B. Moore*, 111.

It can be made only to the sheriff himself *as such* by the name of his office; and for the appearance of the defendant. *Cotton v. Wale*, *Cro. Eliz.* 562; and though the bond be to the sheriff of Durham on a writ issued immediately from K. B. it is not void. *Jackson v. Hunter*, 6 *T. R.* 71; but if it be void upon the face of it, as where it appears to have been taken after the return of the writ, stated in that condition, judgment obtained thereon will be arrested. *Samuel v. Evans*, 2 *T. R.* 569, and it is void on *non est* To whom bond made.
Where void, or not.

What condition
may contain, &c.

factum. Thompson v. Rock, 4 M. & S. 338. One surety is sufficient. 10 Co. 100. Rogers v. Reeves, 1 T. R. 418. Saund. 21; but the very words of the process need not be pursued, so that the general intent of the process be stated. Shuttleworth v. Pilkington, 2 Str. 1155. also cited by Buller, J. in King v. Peppitt, 1 T. R. 255. Kirkhide v. Dyke, 2 Lev. 180. Villiers v. Hastings, Cro. Jac. 286. Jones v. Stordy, 9 East, 55. nor is it necessary to state the nature of the action. Owen v. Nail, 6 T. R. 702. but if the action be against three jointly and severally, and the sheriff take one bail bond for a joint appearance it is void. Grovenor v. Soame, 6 Mod. 122. And where the writ was to appear before "his majesty's justices of the Bench at Westminster," and the mandate to a bailiff of a liberty was to appear before "his said majesty at Westminster," and the condition in the bail bond followed the mandate, the bail bond was held void. Renaldi, assignee, &c. v. Smith and others, 2 Marsh. 258. And see where it was held, that it was only necessary to set out the condition in the declaration in an action on the bail bond according to its legal effect. Bonfellow v. Steward, 3 J. B. Moore, 214. See also Luckett v. Plummer, 5 Id. 538.

Where defend-
ant arrested in
two counties.

If a plaintiff sue out writs into two counties, and arrest the defendant in both, who gives bail in both, the defendant does not thereby obtain the right of electing in which county, the bail shall stand, but the bail first given remain liable. Hullock v. Norris, 2 Taunt. 667.

BAIL BOND, Assignment of.

Statute 4 & 5 Ann.
c. 16. s. 20.
This statute in
Pickering's edi-
tion stands 5th
Ann.

The statute 4 & 5 Ann. c. 16. s. 20, enacts, that the sheriff, at the request and cost of the plaintiff or his attorney, shall assign to him the bail bond, by indorsing the same and attesting it under his hand and seal in the presence of two or more credible witnesses, without stamp, provided it be stamped without action brought thereon, and if the same be forfeited, the plaintiff, after assignment made, may bring an action thereupon in his own name, and the court may, by the rule of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail upon the said bond, as is agreeable to justice and reason, and such rule of the court shall have the effect of a defeazance to such bail bond.

Statute compul-
sory on sheriff.
By whom assign-
ment made.

The statute is compulsory upon the sheriff, and if he refuse to assign the bond on request, an action may be brought. Stamper v. Milbourne, 7 T. R. 122. and the assignment must be made by him or by his under-sheriff in his name, or it will be bad; the clerk to the under-sheriff cannot do it. Kilson v. Fagg, 1 Str. 60. but the sheriff cannot in any case compel the plaintiff to accept such assignment. Rex v. Daws, *Ld. Raym.* 722.

But plaintiff not
compelled to ac-
cept.

If the bail do not justify in four days exclusive after notice of exception to them, the plaintiff may take an assignment of the bail bond; but if the fourth day be the last day of term, and the defendant do not justify his bail before the rising of the courts, the plaintiff may take an assignment of the bail bond on that day after the rising of the court. Dent v. Weston, 8 T. R. 4. Four days must remain of term, otherwise notice in K. B. and C. P. must

be given of justification for the following term. And the plaintiff may abandon an attachment issued against the sheriff, and take an assignment of the bail bond. *Pople v. Wyatt*, 15 *East*, 215. But whilst the attachment remains in force he cannot take such assignment in order to proceed against the defendant or his bail. *Cunningham v. Chambers*, 1 *Chit. R.* 394. n. Nor can the plaintiff proceed in the original action after such assignment, and whilst he retains his right to sue upon it. *Id. ib.*

A distinction prevails in the practice of the two courts, and laches or default of one party is assigned as the ground and principle of each practice. In K. B. the plaintiff, notwithstanding he would be out of court by not declaring in two terms after return of the process, may yet take an assignment of the bail bond, though two terms shall have expired: for by not putting in bail the defendant has prevented the plaintiff from declaring in chief, and he is not *obliged* to declare *de bene esse*; it may be presumed therefore to be the defendant's own default that the declaration has not been filed or delivered, and he shall not be enabled to take advantage of his own wrong. *Merryman v. Carpenter*, 2 *Str.* 1262.

In C. P. it is decided, that the sound construction of the statute requires that the suit must be depending when assignment is made, and if the plaintiff hath not declared *de bene esse* it must be through his own default that he is out of court, as is the case where a defendant doth not declare before the essoign day of the third term inclusive, after the return of the writ. *Sparrow v. Naylor*, 2 *Bla.* 876.

The general rule is, that where bail are duly put in, exception is a waiver of the assignment of the bond, but this rule does not hold where the defendant doth not put in bail *in time*. *Boldero v. Gray*, 2 *Comp.* 769.

The application for the assignment of the bail bond is matter of prudential consideration on the part of the plaintiff's attorney; he should be aware that he thereby forfeits a right to resort to the most unexceptionable security, the sheriff, should the defendant have failed in duly putting in bail, and that number of persons do not always present the best security; whereas in cases of certain defaults the sheriff is answerable by a sure and comparatively summary process: but supposing an action on the bail bond to be determined upon, the next subject-matter for consideration is the proceedings in such action.

We have seen that by statute 4 & 5 *Ann.* above abstracted, the plaintiff may bring an action on the bail bond if forfeited.

By *R. G. C. P. T.* 30 *G.* III. no bail bond taken in London or Middlesex, under process returnable in C. P. on the first return of a term, shall be put in suit until after the fifth day, nor bonds taken elsewhere until after the ninth day in full term; nor if under process returnable on subsequent returns, until after four days and eight days respectively, exclusive of the return day of the process. 1 *H. Bl.* 525.

The assignees of a bail bond, without any sufficient reason for so doing, brought separate actions against each of the bail. The court, upon payment of the costs of one action, only stayed the

Distinction in
K. B. and C. P.
Practice K. B.

Practice C. P.

What generally,
waiver of assign-
ment.

To proceed on
bail bond, or not,
prudential.

R. G. C. P. T.
30 *G.* 3. as to
when bail bond
may be put in
suit.

Where separate
actions not to be
brought.

BAIL BOND, *Assignment of; Action on; Cases.*

proceedings in all. *Dissentiente Abbott, C. J. Key v. Hill, 2 B. & A. 598. S. C. 1 Chit. R. 337.* But in such case C. P. will not stay proceedings in one action, except on payment of costs of all. *Id. 338. n.* And action commenced on bail bond, pending motion for setting aside a rule for allowance, which rule was discharged on account of perjury of the bail, held regular. *Brown v. Gillies, Id. 496.*

Action not by
bailable process.
In what court.

The action is not commenced by a bailable process. 1 *Sel.* 179.

It has often been determined that the action must be commenced in the same court with that of the original action in which the bail bond was taken. *Walton v. Bent, 3 Burr. 1923. Morris v. Rees, 2 Bl. Rep. 838.* Indeed the construction of the statute warrants no other decision, *ibid.*; so if in a county palatine, *Chesterton v. Middlehurst, 1 Burr. 642*; or if one of the bail be an attorney of another court, *How v. Bridgwater, one, &c. Bar. 117*; but the defendant cannot take advantage of this, under the plea of *non est factum*. *Wright v. Walmsley, 2 Campb. 396.* And in debt upon a bail bond C. P., if the declaration state the condition to be for the defendant's appearance before his majesty at Westminster, it is bad on general demurrer; for it was held to describe an appearance in K. B.

Venue.

But the venue may be laid in any county. *Gregson v. Heather, 2 Str. 727. 2 Ld. Raym. 1455.*

Qy. as to whether
sheriff is
confined to the
original court.

It has been ruled that the action by the sheriff himself is not confined to the original court. *Newman v. Fawcitt, 1 H. Bl. 631.* Subsequent decisions however seem to warrant a contrary inference, namely, that all actions respecting the bail bond must be brought in the court from whence originated the first process. *Dixon v. Heslop, 6 T. R. 365. Donatty v. Barclay, 8 T. R. 152*; but it may be observed that in some of these last cases the proceedings were manifestly at the suit of the same plaintiff, and the original cause of action, however remotely, remained the same.

The action in *Newman v. Fawcitt, ubi supra*, was at the instance of a different plaintiff, and the cause of action a specific breach of a specific condition, totally unconnected with the original cause of action, and with which a sheriff, as sheriff, can have nothing to do; in this way it is submitted, with great deference, these several decisions may be deemed not to militate against each other even in principle; not however if the case of *Donatty v. Barclay* be considered as settling the point.

And the plaintiff may proceed against the bail, although the original action is out of court, it not appearing when the bail bond was assigned. *Collett v. Bland, Wilson v. Fisher, 4 Taunt. 715.*

But the plaintiff cannot sue on a bail bond after ruling the sheriff to bring in the body. *Blackford v. Hawkins, 1 Bing. 181.*

What defendant
may plead.
Arrest cannot be
traversed.

The defendant may plead that no such process issued, and consequently that the plaintiff has no ground of action. *Saxby v. Kirkus, Say. R. 116*; but the arrest cannot be traversed. *Watkins v. Parry, 1 Str. 444. Haley v. Fitzgerald, Id. 648. S. P.*

And where bail above are put in but not justified, and the sheriff being fixed, brings an action on the bail bond, to which the defendant pleads *comperuit ad diem*, the court will on motion by

the sheriff order the recognizance of bail on the original action to be struck off the file; though the defendant allege that the sheriff was fined through his own negligence: for that should be the subject of motion to stay the proceedings on the bail bond. Leigh, esq., and another *v. Bartles*, 1 *Marsh.* 520. 6 *Taunt.* 167. S. C.

The action proceeds like any other action in debt on bond, no writ of inquiry being necessary, *Moody v. Pheasant*, 2 *B. & P.* 446; but, the statute investing the courts of law with an equitable interference in respect of these actions, provided the plaintiff hath used due diligence in the commencement thereof, *Hutchinson v. Hardcastle*, *Bar.* 103, they admit of the proceedings being stayed therein, *provided the plaintiff be in the same situation he would have been in but for the default of the defendant*, and therefore upon application to the court the proceedings will generally be stayed upon certain and known conditions, namely, that the defendant shall perfect bail in the original action; but this is unnecessary if the proceedings are irregular, or against good faith. *Heath v. Gurley*, 4 *J. B. Moore*, 149. And further terms imposed are that the defendant shall receive a declaration, plead issuably, take short notice of trial, and pay the costs, to be taxed, incurred in consequence of the bail bond having been assigned, and of the proceedings thereon. And by *R. G. T.* 59 *G. III.* no rule shall be drawn up for setting aside attachment regularly obtained against the sheriff, for not bringing in the body, or for staying proceedings regularly commenced on assignment of bail bond, unless application for such rule shall, if made on the part of defendant, be grounded on an affidavit of merits, or if made on the part of sheriff, or bail or officer of sheriff, or at his or their own expence, or as his or their indemnity, and without collusion with defendant. 1 *Chit. R.* 128, n.

No writ of inquiry necessary. Equitable jurisdiction of the court.

The conditions imposed on defendant.

What the affidavit must state.

When application is made to set aside the proceedings on the bail bond for irregularity, or if regular, to stay them upon terms, the rule or summons and affidavit should be entitled in the original cause. *Webb v. Mitchell*, *M.* 48 *G. III.* K. B. *Kettle v. Woodfield*, *T.* 40 *G. III.* K. B. 1 *Tidd*, 326.

Where plaintiff took an assignment of the bail bond, and afterwards gave notice of exception to the bail, without entering it, held the plaintiff's irregularity in not entering an exception was not waived by defendant's having given two notices of justification, under one of which the bail justified, and therefore held that proceedings should be stayed; but the bail bond was not to be delivered up to be cancelled. *Hodson v. Garratt*, 1 *Chit. R.* 174.

Irregularity a ground for staying.

The court will not stay proceedings on a bail bond where a trial has been lost, except on the terms of the bonds standing as a security; and *quære*, whether the same practice would not now prevail in case of an attachment? *Phillips v. Whitehead*, *Id.* 270. *Nias v. Gray*, *Id.* 270, n.

Explanation of terms "losing a trial," and "bail bond standing as a security." *Id. ib.*

But the defendants in an action on the bail bond are entitled to a demand of plea and rule to plead, though the judgment shall

Plea must be demanded, &c.

have been set aside against the principal, and the bail bond to stand as a security. *Evans v. Surnam*, 1 *N. R.* 63. And after judgment against the principal where bail bond stands as a security, the bail are entitled to a rule to plead, and demand of a plea before judgment against them. 1 *Chit. R.* 270.

Where plaintiff has been negligent.

Where trial has been lost, &c.

And it is to be understood that the court will in all cases stay proceedings on the bail bond where the plaintiffs by their neglect have forfeited their claim to institute proceedings against the bail. *Pigott v. Truste*, 3 *B. & P.* 221. though the plaintiff shall have lost a trial by the defendant's delay, yet the court, without requiring an affidavit of merits, *Hardisty v. Storer*, 1 *N. R.* 123; but *K. B.* requires such affidavit. *Grottick v. Bailey*, 1 *B. & A.* 703. But where an affidavit of merits is produced, it is not necessary to state on whose behalf the motion is made. *Bell v. Taylor*, 1 *Chit. R.* 572, and see 721. And the court will permit the defendant to try the original question, and proceedings will even be stayed though a verdict shall have been obtained in the action on the bail bond, *Birch, one, &c. v. Graves*, *Bar.* 74, on consenting, in addition to the terms above mentioned, that the bail bond stand as a security for the plaintiff's debt and costs, if he recover in the original action. And if he do recover, the defendant in the action on the bail bond, if he have not already pleaded, cannot plead *comperuit ad diem*, but on motion judgment may be immediately entered up. *Otway v. Cokayne*, *Bar.* 85.

And bail bond is to stand as a security where a trial has been lost, and therefore where one defendant was arrested on a latitat, returnable in Hilary Term, and the other on an alias writ in Easter Term, and if bail above had been duly perfected, the plaintiff might have tried the cause at the last sittings in Hilary Term: Held, that the bail bond must stand as a security. *The King v. London (Sheriffs)*, 1 *Chit. R.* 359.

But in Exchequer of Pleas, where a plaintiff who has taken an assignment of a bail bond after bail have been put in, but not perfected, consented by his clerk in court to an order for staying the proceedings on payment of costs, he is not entitled to have the security of the bond, although he may have lost the opportunity of going to trial, because it is in such a case the result of his own conduct. *Blore v. Mottram*, 7 *Price*, 535.

Thus far the terms imposed by *K. B.*, where, by the defendant's delay, the plaintiff has lost a trial.

But the proceedings on the bail bond were stayed where bail had justified, and where no trial had been lost, and the court would not impose the terms of accepting a declaration pleading issuably, and taking short notice of trial. *The King v. London Sheriffs*, 1 *Chit. R.* 357.

C. P. imposes further terms.

C. P. go somewhat farther in adding to the security of the plaintiff, namely, that court has determined that the plaintiff may take judgment in these actions, which judgment is to remain as the security, and if the plaintiff recover, execution may be issued immediately.

Farther grounds or staying proceedings.

The certificate of the original defendant, a bankrupt, obtained *previously* to commencing the action on the bail bond, is a ground

for staying proceedings on such action, but not if certificate be obtained subsequently to the commencing such action. *Cockerill v. Owston*, 1 *Burr.* 436.

So defendant in an action on a bail bond (given in an action of debt against himself) becoming bankrupt between plea and verdict, in the action on the bail bond, is discharged from the damages and costs. *Dinsdale, Assignee of the Sheriff of Middlesex v. Eames*, 2 *Brod. & Bing.* 8.

Where an action is brought against two only of three joint contractors, the court will not stay proceedings commenced on the bail bond, unless the defendants will undertake not to plead in abatement. *Govett v. Johnson*, 2 *B. & P.* 465.

Where abatement not allowed.

The defendants having signed a regular bail bond, were held to have waived the irregularity of the omission of their christian names in a *capias ad respondendum*, directing the sheriff to take Messrs. L. and B. *Kingston v. Llewellyn*, 1 *Brod. & Bing.* 529. 4 *J. B. Moore*, 317.

How defendant waives irregularity by signing bail bond.

Before stat. 49 G. III. according to the case of *Carmichael v. Chandler*, *Imp. K. B.* 194. the plaintiff might not only prove his debt in the original action under a commission against the defendant, but might also proceed on the bail bond; but by the 14th section of this act plaintiff proving or claiming a debt under a commission of bankruptcy, is to be deemed an election not to proceed at law.

Cannot proceed on bail bond and prove under commission.

Where in an action of debt an assignment of a bail bond was taken, the defendant not having perfected bail, and an action being brought on the bond, he became bankrupt between plea and verdict, and obtained his certificate after final judgment: Held, that he was discharged from the damages, and costs of the latter action, as the debt on the bail bond was proveable under the commission. *Dinsdale v. Eames*, 4 *J. B. Moore*, 350. 2 *Brod. & Bing.* 8.

Mistake of the defendant as to putting in bail improperly, *e. g.* filing the bail-piece with the filazer instead of the prothonotary, the plaintiff having sued by a *testatum* attachment of privilege, is also a ground for staying proceedings on the bail bond. *Garnett v. Heaviside*, *Bar.* 68; also where the bail-piece was filed with the filazer without a judge's *allocatur* being previously obtained. *Hutchinson v. Hardcastle*, *Id.* 103, also surrender of the principal if duly made and notice given. 1 *Chit. R.* 128. n. So although no notice shall have been given of such surrender, &c. *Lepine v. Barratt*, 8 *T. R.* 223, and this though execution shall have been levied against the bail; or where no justification shall have taken place. *Meyssy v. Carnell*, 5 *T. R.* 534.

What mistake a ground for stay of proceedings,

Other cases.

Bail having been put in and justified, the defendant pending a rule *nisi* for setting aside the allowance of such bail was rendered. The rule *nisi* being afterwards made absolute, an assignment of the bail bond was taken: Held, that such assignment was regular, the render under such circumstances being insufficient. *Brown v. Jennings*, 2 *B. & A.* 768.

Surrender,

But the application on this as on other grounds, must be on payment of costs; also payment of debt, whether principal, in:

terest, and costs. *Butler v. Rolls*, 3 *Salk.* 55; but plaintiff, by such application to stay proceedings, must not be prevented from going to trial, therefore payment must be within such time as that no delay of proceeding to trial take place. *Butler v. Rolfe*, 6 *Mod.* 25. S. C. as that 3 *Salk.* 55.

Where all costs must be paid.

If one of the bail apply to stay proceedings it will be granted upon payment of the debt and all costs incurred against the other bail as well, and also against the principal. *Walker v. Carter*, 2 *Bl. R.* 816.

One motion may be made in the *original* action to stay all the proceedings on the bail bond given in that action, and one rule in such case seems to be sufficient. *Nicklen v. Profit*, Same *v. Taylor*, Same *v. Birley*, *H.* 37 *G.* III. K. B. 1 *Tidd*, 502.

Where death occurs.

The death of either party to the original action happening previously to the time when judgment could have been obtained had bail been duly perfected, is also a ground of staying proceedings in the action on the bail bond; if the defendant die before the time when the plaintiff might regularly have had judgment, proceedings on the bail bond will be stayed on payment of costs only. *Orton v. Vincent*, *Cowp.* 71; but where he dies after that time, the bail are liable for the whole debt and costs. *Id. ib.* So where the plaintiff dies previously to the time judgment would have been recovered in the original action, proceedings on the bail bond will be stayed on payment of costs only. *Willoughby v. Rhodes*, *Bar.* 70; but if he die subsequently to the time judgment might have been obtained, executors may proceed on the bail bond for the whole of the debt and costs. *Nutkins v. Wilkin*, *Id.* 96. So if plaintiff be prevented going to trial by the delays of the defendant in putting in bail, and die, proceedings on the bail bond will not be stayed on payment of costs only. *Morley v. Carr*, *Id.* 112.

Affidavit to set aside proceedings on the bail bond after notice of render had been given, must state that the application is made *bonâ fide* on behalf of the bail, but time given for producing further affidavit. *Merryman v. Quebble*, 1 *Chit. R.* 127.

Regular proceedings on the bail bond cannot be set aside where the motion is made on behalf of the defendant without affidavit of merits, although the plaintiff had opposed the justification of bail and received the costs of opposition. *Hilton v. Jackson*, *Id.* 677.

In what cases proceedings may be set aside. Due surrender.

The principal surrendered to the gaoler at the county gaol on the return day before twelve o'clock, the under-sheriff signified his assent to such surrender the next day by return of post, and of which the plaintiff's attorney had notice, after which he took an assignment of the bail bond; assignment held irregular. *Plimpton v. Howel*, 10 *East*, 100.

Where a defendant applied to the under-sheriff before the return of the writ to surrender himself in discharge of his bail, which he refused to accept without assigning any reason for so doing, and the day after he surrendered himself to the keeper of the county gaol, which was also before the writ was returnable, and the bail bond was afterwards assigned to the plaintiff, the court of C. P.

ordered the proceedings on it to be stayed without costs. *Lewis v. Davies*, 5 *J. B. Moore*, 267.

Irregularity in the original process and subsequent proceedings, Irregularity, or in the bail bond, or in the assignment, or in any of the proceedings thereon, will form a ground to set them aside; omitting to state in affidavit that goods were delivered as well as sold. *Lascar and Another v. Morioseph*, 1 *Bing*. 557. And see *Hopkins v. Vaughan*, 2 *East*, 398; but where irregularity may be waived, see *Kingston v. Llewellyn*, 1 *Brod. & Bing*. 529. cited *ante*, page 203. But in whatever consists the irregularity it should be stated in the affidavit on which to ground the rule *nisi*.

And if proceedings on a bail bond are irregular, or against good faith, it is unnecessary to put in bail before application is made to set them aside. *Secus* if regular, and the defendant applies to set them aside on terms. *Heath v. Gurley*, 4 *J. B. Moore*, 149.

A bail bond given on an arrest for loss on a policy of insurance, Where party not liable to arrest. was ordered to be delivered up to be cancelled, such policy being a contract for indemnity. *Lear v. Heath*, 1 *Marsh*. 19. *S. C.* 5 *Taunt*. 201.

The defendant was arrested, and executed a bail bond by the initials of his christian names only as the acceptor of a bill of exchange, in which his initials only appeared: Held, that the bail bond ought to be cancelled, but without costs. *Parker v. Bent*, 2 *D. & R.* 73.

But where a widow was arrested upon a bill of exchange accepted by her in the name of W. S. Chatterley, by which name she had always gone since her husband's death, W. S. being the initials of her husband's christian names, the court set aside the bail bond only on entering a common appearance. *M'Beath v. Chatterley*, 2 *D. & R.* 237.

Where a defendant has been arrested by a wrong name, and has given a bail bond, and moves to set aside proceedings, the court will require him to file common bail, and undertake not to bring any action. *Kitching v. Alder*, 1 *Chit. R.* 282.

But it is no ground for cancelling the bail bond that the attorney who sued out the writ had neglected to take out his certificate. *Welch and Another v. Pribble*, 1 *D. & R.* 215.

Husband and wife being arrested for a debt contracted by the latter *dum sola* the rule for cancelling the bail bond for the wife was made absolute, but *without costs*. *Taylor v. Whittaker and Wife*, 2 *D. & R.* 225.

Where a married woman was arrested as the drawer of a bill of exchange, and had given a bail bond, the court of C. P. ordered it to be delivered up to be cancelled. *Samwell v. Rebecca Jenkins*, 6 *J. B. Moore*, 500.

But bond given by member of parliament under 4 *G. III.* c. 33, not directed to be delivered up on motion on ground of defendant's bankruptcy and certificate. *Hunter v. Campbell*, 1 *Chit. R.* 731.

And where on the discussion of the rule *nisi* for setting aside the proceedings on the bail bond, the plaintiff seeks to have the bail bond stand as a security, he must shew that he used due

Proceeding pending a rule nisi will be set aside.

Where set aside on account of death.

Where defendant alien.

means to expedite the cause, and that he declared as soon as it was in his power. 1 *Chit. R.* 271. n.

If a rule nisi be obtained in the original cause, and why all proceedings in the mean time should not be stayed, and pending such rule, an assignment of the bail bond be taken, it will be set aside. *Swayne v. Crammond*, 4 *T. R.* 176; and see *Brown v. Jennings*, 2 *B. & A.* 768, cited *ante*, page, 204.

Where an assignment of the bail bond was taken in an action and the plaintiff died before the return of the writ; and where verdict and judgment were obtained on such bail bond, the whole proceedings were set aside. *Hutchinson v. Smith*, 8 *Mod.* 240. So if the assignment be made after the death of the original defendant. *Kingston v. Holloway*, 1 *Sel.* 188. But this must be understood with limitation. It is true that where the defendant dies before the plaintiff could have had judgment against him, if there has been no delay in putting in and perfecting bail, the court will stay proceedings on the bail bond upon payment of costs only: but where the plaintiff might have had judgment against the defendant if bail above had been put in and perfected in time, the bail to the sheriff are liable for the whole debt and costs, and the court will not relieve them. *Orton v. Vincent*, *Camp.* 71.

So also where the defendant was sent out of the kingdom before the return of the writ, under the alien bill, the bail bond will be cancelled. *Postell v. Williams*, 7 *T. R.* 517. See tit. BAIL, *Surrender in discharge of*, *post*.

PRACTICAL DIRECTIONS, K. B., C. P.

How to obtain assignment of the bail bond in town causes.

In country.

To be stamped.
How action to be commenced.

As to staying proceedings in the actions on the bail bond.

Bail first to be perfected, &c.

If it be determined to proceed upon the bail bond, apply, if in London, at the secondaries; if in Middlesex, at the sheriff's office; if in any other county, at the office of the under-sheriff, for an assignment thereof, which, in compliance with the statute 4 & 5 Ann. c. 16. s. 20, is immediately made; in London or Middlesex pay 6s.; in the country 6s. 8d.; before proceeding thereon such assignment must be stamped, 2s. 6d.; for this purpose take same to the stamp office. The action is commenced by process issuing out of the same court, and the proceedings are similar to any other action of debt on bond. But see *Key v. Hill*, 2 *B. & A.* 598. 1 *Chit. R.* 337. *S. C.* cited page 200, *ante*, as to separate actions.

If the object of the defendant's attorney, or of the attorney on the part of the bail, be to obtain a stay of proceedings in the action on the bail bond, on the grounds or terms above mentioned, it may be attained by motion in term time, and by summons before a judge in vacation; in the adoption of either of which methods, according to the exigency of the case, there should be no delay after action commenced. And on motion for setting aside such proceedings, bail above having justified, the affidavit must state that the defendant has a good defence upon the merits. *Grottick v. Bailey*, 5 *B. & A.* 703.

First, therefore, let bail be put in as above-mentioned under the head BAIL above. The previous notice to the plaintiff's attorney should state the intention of the defendant, namely, that he will put in and perfect bail on the day named. No. 1. FORMS subjoined, such bail as before stated may be opposed without a waiver of the bail bond, *Boldero v. Gray*, *Cowp. R.* 769. which being done, let an affidavit of the

bail having been duly perfected be made. See affidavit, No. 2, FORMS subjoined; then obtain the rule for the allowance; of which serve a copy; having proceeded thus far, give brief to counsel or serjeant, with the title of the original cause indorsed; the affidavit of the bail being duly perfected; See No. 2, FORMS subjoined; and also an affidavit of the service of the rule for the allowance of the bail, must be ready. The FORM, No. 2, comprehends both the facts. The motion is granted for a rule nisi, and that in the mean time proceedings be stayed; get rule at the clerk of the rules, K. B., or secondaries, C. P.; serve copy on plaintiff's attorney.

On the day mentioned in the rule give brief to counsel, or serjeant, indorsed, "To move to make the within rule absolute." The motion is granted upon an affidavit of service of copy of rule nisi; upon payment of costs.

Get the master's or prothonotary's appointment on the rule previously to service of the copy, or as soon as possible, for taxing the costs; attend appointment and pay costs, or the proceedings may go on. Tax and pay costs.

The proceeding by summons, K. B. C. P. is the same mutatis mutandis; but in a matter of so much moment the general practice will be stated. Stay of proceedings by summons.

The application for a stay of proceedings upon the bail bond upon putting in and perfecting bail may be made in vacation to a judge at chambers.

Bail must first be perfected, and rule for the allowance obtained and served as above.

A summons is then taken out to the same purport, and on the same affidavit as that on which the rule nisi is moved; copy must be served; the defendant's attorney attends half an hour; an affidavit of the service is already prepared, and the judge makes an order for the proceedings to be stayed upon payment of costs, to be taxed; get appointment thereon, serve copy; attend taxation, and pay costs as soon as possible, as above directed.

If the object be to set aside the proceedings in the action on the bail bond, a notice of motion, No. 3, FORMS subjoined, must be duly given: give brief to counsel or serjeant, on or before the day of the intended motion, together with an affidavit of the service of the notice, and of the facts, whether of irregularity or otherwise, as the case may be, upon which the motion is founded. Draw up the rule, if granted, and see that the clause, "in the mean time proceedings be stayed," be inserted therein; and proceed to move to make it absolute, as before directed mutatis mutandis. And see tit. MOTION, post. Of motion for setting aside assignment of bail bond, &c.

The plaintiff's attorney may oppose the application for a rule nisi, and if such be his intention he must of course instruct counsel or serjeant, either by affidavit or otherwise, why opposed, or he may reserve opposition until the day for shewing cause mentioned in the rules. May be opposed.

If the object be to stay proceedings in three actions upon the bail bond upon payment of the costs of one, bail must have justified; and the affidavit, No. 2, FORMS subjoined, must be made. See the FORM, No. 2, being the affidavit of bail above having been put in and perfected, and of service of copy of rule for allowance, and No. 4, being the notice of motion. I do not know that the notice is necessary.

FORMS.

[Court.]

[Title cause in the original action.]

No. 1.

Take notice, that _____, of _____, and _____, of _____, will, on _____ next, put in and become bail for the

Notice of putting in and perfecting bail.

BAIL BOND, FORMS; Proceedings on Recognizance; CASES.

above-named defendant in this cause, and will at the same time justify themselves in open court, as sufficient bail for the said defendant. Dated this — day of —, 18—.

Your's, &c.

To Mr. —, attorney for the — Attorney for the above-named plaintiff. — named defendant.

No. 2.

[Court.]

[Title cause in the original action.]

Affidavit of bail being perfected, and of service of allowance.

—, of —, clerk to Mr. —, of —, attorney for the above-named defendant in this cause, maketh oath and saith, that bail above was on the — day of — instant, put in for the defendant in this cause; and that on the — day of — instant, the same bail duly justified themselves as good and sufficient bail for the said defendant therein, and that thereupon the said bail were duly allowed by this honourable court; and this deponent further saith, that he did, on the — day of — instant, serve Mr. —, the attorney for the said plaintiff, with a true copy of the rule for the allowance of the said bail hereunto annexed, by delivering the said copy to the clerk of the said Mr. —, at his house [chambers] in —.

No. 3.

[Court.]

[Title cause in the original action.]

Notice of motion for setting aside assignment of bail bond.

Take notice, that this honourable court will be moved on — next, or so soon after as counsel can be heard, for a rule to shew cause why * the bail bond assigned in this cause should not be set aside with costs, and in the mean time all proceedings stayed.

Sworn, &c.

N. The affidavit will be varied according to the facts.

No. 4.

[Court.]

[Title cause in the original action.]

The like for staying proceedings where three actions of bail bond.

Take notice, &c. [as above, down to the asterisk] why the proceedings in three actions on the bail bond in this cause should not be stayed upon payment of costs of one of the actions, to be taxed by the master, bail above having justified. Dated this — day of —, 18—. Your's, &c.

—, Attorney for the above-named defendant.

To Mr. —, attorney for the above-named plaintiff.

BAIL, Proceeding against Bail on Recognizance.

Observation.

Exclusively of the remedy against bail on the bail bond, and which may be called the first case in which bail, by reason of certain defaults previously mentioned at length, became personally liable to pay the plaintiff his debt and damages, bail are in like manner liable on their recognizance; what a recognizance is, will best appear by the FORMS Nos. 1 & 2, p. 192, *ante*. The recognizance may be considered as the formal record of the terms of their undertaking.

It seems to be the practice to lodge the *ca. sa.* at the sheriff's office four days before the return, as mentioned in the Practical Directions, *post*.

As to what bail liable for on their recognizance, see *post*.

The nature of, and to what extent the recognizance binds the bail, will have sufficiently appeared. See BAIL, ABOVE, *ante*; and it remains to abstract the several determinations that have taken place with respect to proceedings on the recognizance; and to detail the proceedings for recovery thereon.

It may be premised, that where the substantive cause of action does not require special bail without an order, if the plaintiff hold the defendant to bail on the money counts, and recover nothing thereon, the court, on motion, will discharge the bail from their recognizance. *Caswell v. Coare*, 2 *Taunt.* 107.

And if the plaintiff sue the bail by action, and take them in execution, he cannot afterwards take the principal, though one of the bail become bankrupt and be discharged, and the other also be discharged on payment of 5s. in the pound, and upon an understanding that the plaintiff was to be at liberty to proceed against the principal. *Allen v. Snow*, 2 *M. & S.* 341. *Cro. Jac.* 320. 2 *Tidd*, 1171.

Practice has pointed out two modes of proceeding against the bail on their recognizance, viz. by action of debt, which by reason that costs and damages are recoverable, is to be preferred; and where costs are not recoverable, by writ of *scire facias*.

Modes of proceeding on recognizance.

Previously to either mode of proceeding being adopted, the recognizance must be duly entered on the roll, &c. as hereafter mentioned. See PRACTICAL DIRECTIONS, subjoined to this title. The recognizance must have been taken in the names of the proper parties; for if in a joint action against two, the recognizance of bail be drawn up by mistake in an action against one only, and the plaintiff, after two writs of *sci. fa.* against the bail, and *nihil* returned to them, sign judgment against the bail, and take out execution, the court will set aside the judgment and execution for irregularity. *Holt v. Frank*, 1 *M. & S.* 199. and if bail by mistake misname in the recognizance the plaintiff to whom they were to be bound, the court will not rectify the recognizance and proceedings in an action thereon after issue joined on *nul tiel* record. *Venn v. Warner*, 3 *Taunt.* 263.

Preliminary proceedings.

Where the affidavit to hold to bail named five defendants, separate bailable process issued against one only, and bail piece taken in which he alone was named, serviceable process issued against the other four, the declaration was against all five, the bail recognizance was allowed to be amended by inserting the names of such four defendants. *Christie v. Walker and four others*, 1 *Bing.* 206.

Amendment of recognizance.

But in an action for not assigning the bail bond, if such action be maintainable, the court of Exchequer would not grant a motion to enter the recognizance of bail on the record, as taken on the true day, it being always entered generally as of the term, to enable the plaintiff to proceed with his action. *Anon.* 3 *Price*, 36.

As a preliminary step to proceeding against the bail, a *capias ad satisfaciendum*, or writ of execution against the person of the principal, must be duly issued, and returned *non est inventus*, and which return will be good, though the sheriff know where the defendant may be found. *Sillitoe v. Wallace*, *Bail of Cawthorne*, *Tidd*, 1128.

Issuing ca. ca.

But it has been ruled, that if the principal were, at the same time, in the custody of the same sheriff who made the return, though at the suit of another person, the subsequent proceedings will be

BAIL, Proceeding against, on Recognizance; CASES.

set aside. *Banks v. Maine and Another*, Bail of Renton, 16 *East*, 2. Yet, a return by the sheriff of *non est inventus*, procured by the plaintiff against the principal, in order to ground proceedings against the bail is irregular, if the principal be at that time in custody of the same sheriff on a criminal charge; and the court set aside the proceedings against the bail with costs, where the plaintiff knew that the principal was in such custody at the time of such return. *Ward v. Brumfit*, 2 *M. & S.* 238.

The defendant having put in and perfected bail, a *ca. sa.* was lodged and returned *non est inventus*, and proceedings being had against the bail, they rendered the principal in time, the defendant was then bailed again and discharged: Held, that proceedings could not be had against the last bail without taking out a fresh *ca. sa.* *Thackary v. Harris*, 1 *B. & A.* 212.

But proving the debt under a commission against the principal, was held to vitiate the *ca. sa.* and to discharge the bail under the stat. 49 *G. III. c.* 121. s. 14. *Linging v. Comyn*, 2 *Taunt.* 246.

The *ca. sa.* must not be tested of a term before that in which judgment shall have been signed against the principal. *Gawler v. Jolley*, 1 *H. Bl.* 74. and there must be eight days between the *teste* and return. *Ball v. Bail of Russell*, 2 *Ld. Raym.* 1177.

If proceedings are by original, there must be fifteen days, and in both cases the writ must lie in the sheriff's office four days, exclusively, before the return. *Anon.* 2 *Salk.* 599.

And an *alias scire facias*, issued against bail must be left at the sheriff's office four days, exclusively, both of the day of lodging it, and the day of the return. *Wilson v. Farr*, 4 *B. & A.* 537.

The leaving the *ca. sa.* against the principal in the sheriff's office, is sufficient notice to the bail of the intent to proceed against them. *Hunt v. Coxe*, 3 *Burr.* 1360.

And where the principal died after the return of the *ca. sa.* and before the return was filed, the bail were held to be fixed, and the court would not stay the filing of the return in favour of the bail. *Rawlinson v. Gunston*, 6 *T. R.* 284.

But where no *ca. sa.* has been sued against the principal within a year, the bail cannot be proceeded against unless such judgment be previously revived by *scire facias*; yet it is ruled, that the bail cannot avail themselves of this. *Cholmondeley v. Bealing*, 2 *Ld. Raym.* 1096.

For proceeding against bail by action on the recognizance, see PRACTICAL DIRECTIONS subjoined. The writ of *quare clausum fregit* will not lie, but the *capias ad respondendum* against the bail on their recognizance may be tested a day prior to the return of the *ca. sa.* against the principal, if in fact it be not sued out till after. *Pinero v. Wright*, 2 *B. & P.* 235. and it may be issued on the return day of the *ca. sa.* against the principal. *Shivers v. Brooks*, 8 *T. R.* 628, and *Stewart v. Smith*, 2 *Ld. Raym.* 1567; and other cases there cited, and the writ of *capias ad respondendum* against bail must be served four days at least before the return. *Martin v. Price*, *Bar.* 62. *Mackenzie v. Martin and another*, 6 *Taunt.* 286. *S. P.* And it has been determined, that the plaintiff is entitled to the costs of such action, commenced after a return

Precaution as to
teste.

Also as to *teste*
and return.

How long to re-
main in sheriff's
office.

Leaving same in
office sufficient
notice to bail.

Where return of
ca. sa. not stayed.

Where *scire*
facias to revive
must issue.

As to proceeding
by action.

of *non est inventus* to the *capias ad satisfaciendum* against the principal, though the bail rendered their principal before the eight days allowed by the practice of the court after the return of the process against the bail. *Hughes v. Poidevin*, 15 *East*, 254.

In proceeding against bail on the recognizance, whether by action thereon or by *sci. fa.* the venue must be laid in Middlesex in K. B. *Coxeter v. Burke*, 5 *East*, 461; but in C. P. the venue may be laid in the county where the bail is taken, or in Middlesex, where the recognizance is filed. *Hob.* 195. *Shuttle v. Wood*, 2 *Salk.* 600. *Rules and Orders* K. B. 251, where 1 *Cro.* 312. is also cited, but the reference does not appear. See also *Pickering v. Thompson*, *Bar.* 207. *Henry v. Thornton*, 2 *Bl. R.* 768, where it was ruled that *sci. fa.* on recognizance of bail in London may be there sued, though the bail be enrolled in Middlesex; but where the defendant was sued by original in London, the *sci. fa.* against the bail must be sued there also; and it does not help the plaintiff who sued out the *sci. fa.* in Middlesex, that bail had by mistake been put in there. *Harris v. Calvert*, 1 *East*, 603. *Wharton v. Sir Edward Musgrave*, *Cro. Jac.* 331. *Impey*, however, cites *Lutw.* 1287, to shew that *sci. fa.* in K. B. may also issue in the county where recognizance taken. *Imp.* 562.

Of proceeding by *sci. fa.* as to the venue in proceeding against bail.

The decisions and authorities as to the *teste* and return of the *sci. fa.* appear to be as follow:

As to the *teste* and return of *sci. fa.* against bail.
K. B.

The *scire facias* ought not to be *tested before*, but it may be upon the return day of the *ca. sa.* *Stewart v. Smith*, 2 *Str.* 866. *Ld. Raym.* 1567. S. C. And if fifteen days intervene between the *teste* of the first writ and the return of the second, it is sufficient. See below, C. P.; and this although there shall not be fifteen days between the *teste* and return specified in each writ, by bill; *aliter*, by original, as it has been said; but see *Sharp v. Clark*, in error, 13 *East*, 391.

In this court the writ of *sci. fa.* may be *tested* on the *quarto die post*, of the return of the *ca. sa.*

C. P.

The *alias sci. fa.* ought not to be sued out before the first be returned, and should be *tested* upon the return day of the first. *Andrews v. Harper*, 8 *Mod.* 227.

There must also be fifteen days between the *teste* of the first and the return of the last *sci. fa.* *Peale v. Watson*, 2 *Bl. Rep.* 922. The first sentence of this short report might leave it doubtful as to whether it were intended that there must be fifteen days betwixt the *teste* and return of the *sci. fa.* itself, but it is clear from the rest of the case, and from the marginal abridgment, that the point was ruled as stated. *Goodwin v. Beakbane*, 12 *Mod.* 215. S. C.; and to this report are added numerous other authorities. See also *Lutw.* 24. *Cook. R. C. P.* 114. *Pr. Reg.* 377.

It is not material as to how many days may intervene between the *teste* and return of each writ of *sci. fa.* where proceedings be by bill, K. B. *Elliott v. Smith*, 2 *Str.* 1139. So in C. P. *Peale v. Watson*, 2 *Bl. R.* 922. But by original, there must be fifteen days inclusive betwixt the *teste* and return of the *alias*, as well as of the first *sci. fa.* *R. E.* 5 G. II. r. 3. a. K. B.

BAIL, Proceeding against, on Recognizance; CASES.

Where in proceeding by bill one *sci. fa.* issues, upon which the sheriff returns *scire feci*, four days betwixt the *teste* and return were held to be sufficient. *Bell v. Jackson*, 4 T. R. 663.

A *sci. fa.* may not bear *teste* on a Sunday. *Dy.* 168.

The *sci. fa.* on a judgment, and it is presumed also generally, must be returnable on a general or on a particular return day as the process in the action was. *Eden v. Wills*, 2 Ld. Raym. 1417.

As to leaving the
sci. fa. in the
office.

The *sci. fa.* against bail must lie four days in the office, as well where *scire feci* is returned as *nihil*. *Williams v. Mason*, cited in *notis*, 1 East, 89. See also R. G. E. 5 G. II. The four days are to be exclusive of the return day, *Id.* And they must also be the last four days previously to the return. *Forty v. Hamer*, 4 T. R. 583.

The first *sci. fa.* where two issue, should be left at least one day previously to its return. 2 *Tidd*, 1163.

If the second writ of *sci. fa.* be in proper time on the file in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it were not entered in the *scire facias* book in the sheriff's office, which is merely a private book for his own convenience. *Heywood v. Rennard*, 3 East, 570.

As to summoning
the bail.

If the bail be summoned *any time before* the rising of the court on the return day of the *sci. fa.* it will be sufficient: so ruled on argument, and after reference to the report of the case of *Webb v. Harvey*, 2 T. R. 757, which was said by the court to have mis-stated the time of service of the summons, it really having been served after the rising of the court. *Clarke v. Bradshaw*, 1 East, 86. See also *Pool v. Willis*, 2 T. R. 758. n.

As to the mode of summoning the bail on *sci. fa.* there seems to be no uniform practice. In Middlesex it appears to be usual to serve the bail with a copy of the sheriff's warrant; in other counties verbal notice only is given; in others none; the court in this case thought some notice to be necessary, and *Salk.* 599, is cited; but this point does not appear by these authorities to have been ruled or alluded to. *Wright v. Page*, 2 Bl. R. 837.

The rule is given on the return day of the last *sci. fa.* by bill; on the *quarto die post* of the return by original; which rule expires in four days exclusively. And Sunday is not at all reckoned. *Wathen v. Beaumont*, 11 East, 276.

As to rule on *sci. fa.* against bail, see further, PRACTICAL DIRECTIONS, subjoined to this title, *post*.

Of quashing the
sci. fa.

This writ before plea may be quashed on the motion of the plaintiff without costs, though the defendant shall have appeared. *Poole v. Broadfield*, Bar. 431.

The bail appearing, the plaintiff declares.

Of the pleadings
in *sci. fa.* against
bail.

The declaration may be entitled generally of the term the *sci. fa.* is returnable. *Ward v. Gansell*, 3 Wils. 154.

If the declaration in *sci. fa.* or debt state that the recognizance was taken in the court of C. B. and upon *nul tiel* record pleaded the recognizance certified, appear to have been taken by one of the judges of the C. B. at his chambers, and afterwards delivered by him into court to be enrolled, it is a fatal variance and a failure

of the record. *Shuttle v. Wood*, 2 *Salk.* 564; not amendable, *Bucksom v. Hoskins*, 1 *Salk.* 52.

Matter may be pleaded in abatement or in bar. *Alice v. Gale*, 10 *Mod.* 112.

That no *ca. sa.* issued against the principal; that he died before the return of the *ca. sa.*; that the plaintiff had other execution; may be pleaded in bar, and the replication to such plea must shew the time when the *ca. sa.* issued, and that it was returned *non est inventus*; traversing the fact generally is ill. *Fortune v. Manu-captors of Davis*, *Carth.* 4. As to what may be pleaded and replied in *sci. fa.* against bail, it may be observed that the general rules of pleading are applicable; as where a plaintiff in his replication stated a particular *ca. sa.* that the principal was alive at the time of its return, and *that this he was ready to verify*; it was held well on demurrer, although it was contended that it ought to have concluded to the country, but *Buller, J.* said that the *ca. sa.* in the replication is new matter; and by the rules of pleading, whenever new matter is introduced, the other party must have an opportunity of answering it. *Henderson v. Wither*, 2 *T. R.* 576.

By stat. 4 & 5 *Ann. c.* 16. s. 12. payment of the sum recovered may be pleaded as well to a *sci. fa.* as to an action of debt.

The bail cannot plead the render of the principal after the re- turn of the *ca. sa.*; for that is only ground of relief on motion. *What bail cannot plead.* *Wilmore v. Clerk*, 1 *Ld. Raym.* 156; nor payment by the principal before the return of the second *sci. fa.*; for the recognizance was forfeited (12 *Mod.* 112. S. C.) before suing out the first *sci. fa.* against the bail. *Conyers v. Man*, cited in the last case from 12 *Mod.* 112.

Where there are several principals, and one only be surrendered or taken in execution, the bail may not plead that fact, and be discharged as to the rest. *Astree v. Ballard*, 1 *Vent.* 315, and the several authorities there cited.

Nor if the writ be merely irregular, as if it was sued out after a year without a *sci. fa.* or made returnable on a day out of term, the bail cannot take advantage of the irregularity by pleading. *Powell v. Taylor*, *M.* 28 G. III, K. B. 2 *Tidd*, 1167.

A defect as to the *ca. sa.* against the principal cannot avail the bail on demurrer. *Campbell v. Cumming*, 2 *Burr.* 1187.

For the ascertaining the amount of damages, a writ of inquiry may be executed in proceeding on *sci. fa.* as well as in other cases. See BAIL. *Where discharged from their liability or not*, post. *Writ of inquiry in sci. fa. against bail.*

Judgment having been obtained against the bail, they may be holden to bail thereon. *Prendegast v. Davis*, 8 *T. R.* 85; and execution may issue against them in such manner as in other actions in K. B. but not in C. P. *Bail, where liable to ca. sa.*

Although in K. B. the bail may be taken in execution upon a judgment on a *sci. fa.* against them, yet it is otherwise in C. P. for after an award of an execution on a *sci. fa.* no *capias* lies against the bail. *Troughton v. Clarke* and another, 2 *Taunt.* 113, 114. *Wooden v. Moxon*, 6 *Id.* 490. 2 *Marsh.* 186. S. C. *Id.* 187. n. 1 *Chit. R.* 191.

But after judgment given against the bail in an action of debt, it seems that *capias* lies. 3 *Salk.* 286.

The practical inference is, that where the bail have lands, goods, &c. upon which to levy, *sci. fa.* may be sued; but where taking their persons might be more available, an action of debt is the preferable mode of proceeding.

Quære as to *testatum* in Middlesex.

But it is said that the *ca. sa.* against the bail should be a *testatum ca. sa.* in all cases. 2 *Sel.* 63, *sed quære*, where the levy is to be made in Middlesex.

Further as to the execution against bail.

Though the *sci. fa.* be joint, yet execution may be several, and taken out against one of the bail only; but after execution of part against one bail, if the goods of the other be not sufficient to satisfy the residue, plaintiff cannot again resort to the first bail. *Fisher v. Carruthers*, *Bar.* 202. If execution issue against bail, and the plaintiff be not satisfied, the principal is still liable. *Freeman v. Executors of Freeman*, *Cro. Jac.* 549, *contra* *Higgin's case*, *Id.* 320.

For what bail are liable.

It might be presumed that whatever the bail would be called upon to pay on an application to stay proceedings against them, such amount may be levied on an execution against them on their recognizance.

But they are not liable on their recognizance for any cause of action which is not stated in the affidavit, whereon the defendant is holden to bail. *Wheelwright v. Jutting*, bail of Files, 7 *Taunt.* 304. S. C. 1 *J. B. Moore*, 51.

Distinction in the K. B. and C. P. as to this.
K. B.

There seems to be some distinction, however, in the practice of the two courts as to this question; in K. B. it may seem that the bail are only liable upon their recognizance to the amount of the debt sworn to and costs. *Jackson v. Hassel*, 1 *Doug.* 330. *Clarke v. Bradshaw*, 1 *East*, 86. *Tranel v. Rivaz*, *Id.* 91. n.

And it is now settled, that where the plaintiff declares for, or recovers a *greater* sum than is expressed in the process upon which he declares, the bail shall not be discharged, but be liable for so much as is sworn to and indorsed on the process, or for any less sum which the plaintiff in such action shall recover, together with the costs of the original action. *Peterkin v. Sampson* and another, *M.* 25 G. III. K. B. 1 *Tidd*, 305, where it was determined by the court that the bail are liable to pay costs as well as the sum sworn to. And see *Coles v. De Hayne*, 6 *T. R.* 246.

But where the principal is surrendered in time, the plaintiff cannot afterwards proceed against the bail for the recovery of costs in the action on the recognizance. *Dawson v. Shuter*, *T.* 26 G. III. K. B. *Bartrum and others v. Howell*, *T.* 31 G. III. K. B. 1 *Tidd*, 558. *Byrne v. Aguilar*, 3 *East*, 306. *Smith v. Lewes*, 16 *East*, 168, 9. And see *Creswell v. Hern*, 1 *M. & S.* 742.

C. P.

But in C. P. it was ruled, that each of the bail is liable to the extent of the sum *recovered* against the defendant, and the costs not exceeding his recognizance. *Calvera v. De Miranda*, *Bar.* 76, and in this case the different practice of K. B. was mentioned, but not allowed to govern that of this court. In *Dahl v. Johnson*, it was ruled, that where bail was taken under a judge's order in this court, each of the bail is liable to double the sum ordered, as well as to double the sum sworn to in case of affidavit. 1 *B. & P.* 205.

And C. P. refused, on motion, to assimilate its own practice to that of K. B. in proceedings against bail. *Howell v. Wyke*, 1 B. & B. 490.

Although the court of K. B. be thus tender of the bail on action on the recognizance, or on execution, yet in that court as well as in C. P. bail to the sheriff are held liable to the plaintiff's whole debt and costs (without reference to the sum sworn to) as far as the penalty of the bail bond. *Stevenson v. Cameron*, 8 T. R. 29. *S. P. Mitchell v. Gibbons*, 1 H. Bl. 76.. So attachment against the sheriff will not be discharged but on payment of the whole debt due, and costs beyond the sum sworn to and indorsed on the writ; *Fowlds v. Mackintosh*, 1 H. Bl. 233; but the bail are not liable for costs of *non pros* of writ of error brought by principal. *Yates v. Doughan*, 6 T. R. 288.

For what in both courts bail to the sheriff are liable.

What sheriff is liable to on attachment.

Nor if a plaintiff recover a judgment against a principal for money lent and interest, such plaintiff is not entitled to recover against bail interest on the original judgment. *Waters v. Rees*, 3 Taunt. 503. And where an affidavit to hold to bail is for £167. and upwards on a bill of exchange only, and the plaintiff recover a general verdict for a greater amount, as well on the bill as for goods sold, the bail are liable for so much only as is recovered on the bill of exchange; and it seems that the payment of such sum with costs by one of the bail is a discharge of the other. *Wheelwright and another v. Jutting*, 1 J. B. Moore, 51.

If bail bring error, matter which lies properly in the mouth of the principal, or which might have been pleaded on the *sci. fa.* is not assignable for error. *Wraight v. Kitchingham*, 1 Str. 197.

What bail may not assign for error brought by them. Of amending proceedings in *sci. fa.*

See tit. AMENDMENT. *Scire facias against Bail*, pa. 56, ante; but it had been determined frequently, and is so laid down, that in K. B. neither this writ nor the proceedings thereon were amendable. *Grey v. Jefferson*, 2 Str. 1165. 1 Sel. 64. though it will be perceived in the case mentioned, pa. 56, ante, and above referred to, a relaxation had in this respect taken place, in K. B. *Braswell v. Jeco*, 9 East, 316. Amendment in this case in C. P. seems to have been long allowed. *Sweetland v. Belzley*, Bar. 4.

Several cases will have been mentioned in which it has been deemed expedient to distinguish the difference betwixt proceedings against bail, where the action was by bill, and where by original.

Where proceedings are by original.

It may be observed that the practice in original requires that the writs be returnable to the king's court, which court always is supposed to follow his person; not at Westminster, as is usual with relation to other writs, but wheresoever that court may be. The return too is a general return day, instead of being on a certain day. The recognizance by original is in a penalty; double the sum sworn to; but the costs of the *sci. fa.* cannot be levied thereon, any more than by bill. *Baldwin v. Morgan*, 2 Str. 826. See further, PRACTICAL DIRECTIONS by original.

PRACTICAL DIRECTIONS, K. B.

BY BILL.

The bail piece must be obtained from the judge's chambers, if the bail justified there, or from the master's clerk if justified in open court; pay Obtain bail piece.

Enter proceedings on the roll.

him 1s.; and when so obtained, it must be filed with Provost and Chambré; pay them 4d. per term; before filing take copy.

Enter the proceedings on a roll of the term in which the declaration is entitled; probably a post docket will be necessary for a number roll of the term declaration is of; pay 4s. 8d. make out docket paper and carry in roll; see FORMS subjoined, Nos. 1 and 2.

The roll is to be marked by the clerk of the judgments on entering the recognizance; pay 3s. for the docket; the roll may then be filed in the treasury chamber; or at any time previously to the filing the replication, supposing the bail appear and plead to the subsequent proceedings.

Issue a writ of *capias ad satisfaciendum*, which see under its title; if the action be by bill, be careful that there be eight days, if by original, fifteen days between the teste and return; recollect also that the teste be not prior to the term judgment was signed against the principal. *Gawler v. Jolley*, 1 H. Bl. 74.

Leave ca. sa. at sheriff's office. Return.

Four or five days before the return of this writ leave the same at the sheriff's office; the return is of course *non est inventus*; but if the principal be already in custody of the sheriff on civil process, or on a criminal charge, it may be repeated that the sheriff will not be justified in returning *non est inventus*, but otherwise this return will be good, though the plaintiff knew where to find the defendant. *Sillitoe v. Wallace and Another*, bail of Cawthorne, M. 43 G. III. K. B. 2 Tidd, 1128. 1162. And it must be entered in the book kept at the sheriff's office for that purpose. *Hutton v. Beuben*, 5 M. & S. 323.

File same.

The writ of ca. sa., on being obtained from the sheriff's office is filed with the *custos brevium*; pay —; but this is seldom done, and indeed only where the bail plead no ca. sa.; this therefore may be done at any time. *Rawlinson v. Gunston*, cited ante, page 210; and it seems to be recognized in practice, that of the four days which it is said the ca. sa. must lie in the office, that on which it is lodged may be reckoned as one; but this practice is wrong. See *Howard v. Smith*, 1 B. & A. 529.

As to the action on the recognizance.

Having taken these previous steps, the action may immediately be commenced on the recognizance; the process cannot be bailable in the first instance, but an *ac etiam* must be inserted; see FORM, ante, pa. 10; and it seems that it must be served four days before the return of the writ. *Mackenzie v. Martin and another*, 6 Taunt. 286. Observe the difference of form in C. P. as mentioned in the same page. It does not appear that proceeding by *quare clausum fregit* can be supported, as that writ does not admit of the clause of *ac etiam* being inserted. The venue must be laid in Middlesex K. B. *Skuttle v. Wood*, 2 Salk. 584. *Coxeter v. Burke*, 5 East, 461. In C. P. the venue may be laid where the recognizance was taken. 2 Salk. 600. The action thus commenced is to be proceeded in as in common cases; see FORMS of a Declaration on recognizance, K. B. post. And as to costs where the bail surrender the defendant in time, see page 211, ante; or *Hughes v. Poidevin*, 15 East, 254.

As to proceeding by *scire facias*.

Where proceeding is by writ of *scire facias*, the steps above mentioned to be taken previously to the commencement of the action having been adopted, namely, as to the entry of the recognizance, the issuing the return and filing of the ca. sa., the writ or writs of *scire facias* may be issued; see FORM, No. 3; engross the writ on a 5s. stamped parchment; pay signing 1s. 8d. sealing 7d.; lodge same at the sheriff's office four days at least before the return day. R. G. E. 6 G. II.

Issue writ.

If by summons.

A precept is left with the signer of writs, see FORM subjoined, No. 4. If it be intended to proceed by summoning the bail, which is entirely optional, the issuing of one *sci. fa.* only appears to be necessary, and this being issued, get summons thereon from the sheriff's office; pay 2s. 6d.;

the sheriff's officer usually employed will summon the bail. His fees be immediately after the return of the sci. fa. call for the same; this return is of course scire feci.

Then give a rule at the clerk of the rules K. B. at the prothonotary's Rule on sci. fa. C. P.; see FORMS, No. 5; pay clerk of the rules 2s. 10d.; prothonotary 2s. This rule expires in four days exclusively of the day given; and Sunday is not reckoned at all. *Wathen v. Beaumont*, 11 East, 271.

If no appearance on the expiration of this rule, enter the term, &c. and a part of the sci. fa. as far as the sum recovered on a roll; take same to the clerk of the judgments, who signs or marks the roll; and execution may immediately be issued, whether against the person or against the goods of both or either of the bail. If executions be issued against both bail, only one levy should be effectually made.

In C. P. the prothonotary's clerk gives the roll to enter the sci. fa. on as well as the judgment by default. Signing judgment C. P.

If, however, it be determined not to proceed by way of summons, it appears that two writs of scire facias must be issued, in which case there must be fifteen days between the teste of the first scire facias, and the return of the second by bill; how many days may intervene betwixt the teste and the return of each is not material, so that there be four days between the teste and return of the same writ; and fifteen days between the teste of the first scire facias and the return of the last, as above mentioned; the teste by bill will be the return day of the ca. sa.; by original on the quarto die post of the return day of the ca. sa. On the return day of the first sci. fa. issue the alias sci. fa., the teste of which must also be the return day of the first sci. fa.; this must be left in the sheriff's office four days before the return of the second sci. fa. Where proceeding by sci. fa. is not by summons.

If by bill the sci. fa. must be returnable on a day certain; if by original, on a general return day. Return by bill; by original.

Give a rule on the return day of the alias sci. fa., in like manner as on the sci. fa., where it was intended that the bail should be summoned, which rule expires in four days exclusive; and Sunday is not a day within this rule, though an intermediate one. *Wathen v. Beaumont*, 11 East, 271. If no appearance be entered by the bail, make the entry of the first sci. fa. on a roll, and sign judgment and issue execution as before mentioned; if there be two sci. fas., the entry on the roll will be according to the FORM, No. 6; if there be one only the entry will be according to the FORM, No. 7. Rule on alias sci. fa.

The practice will be the same in both courts mutatis mutandis; the slight difference in the forms, arising from the style of the two courts, will be noticed in parentheses in the FORMS.

The bail, however, whether summoned or not, may, for the purpose of delaying the plaintiff, appear; in which case, unless they plead, their purpose may be obtained without subjecting themselves to the further costs pursuant to statute 8 & 9 W. III. c. 11. s. 3. Bail may appear.

In K. B. the appearance is with the filazer; see post.

In C. P. the entry of appearance will be made with the prothonotary; see FORM, No. 9; pay 3s. 10d.; a memorandum or minute of defence should in both courts be filed at the same time; stamp 5s. Appearance K. B. C. P.

The declaration, in order to avoid an imparlance, is to be delivered four clear days before the end of the term; see the FORM, No. 10; it may be entitled as of the term generally, although the sci. fa. shall have been returnable the last return of the term. Delivery of the declaration. Form of declaration.

The action goes on to execution in the same manner as in other actions in debt or in case. FORM of fl. fa. against bail in case, No. 11. How entitled. Further proceeding.

See page 213, where the cases and decisions as to what bail may or may not plead are cited.

PRACTICAL DIRECTIONS, C. P.

These are so much the same, mutatis mutandis, as to offices, &c. in both courts, that repetition would only incumber; but the FORMS being different are subjoined after those K. B. It should however be recollected that the bail in C. P. are not liable personally on their recognizance, and therefore that no ca. sa. or sci. fa. lies against them. See ante, 216.

PRACTICAL DIRECTIONS,

BY ORIGINAL.

Observation.

The precautions as to the teste and return of the sci. fas. where the proceedings were by original, having been taken, (see page 209) it remains to observe that the subsequent proceedings are much facilitated to the practitioner by the entry of the recognizance and the docketing of the roll, being done by the filazer, and by the sci. fa. being also made out by him. Mr. Impey mentions that the late master doubted whether the filazer were entitled to make out the scire facias; but it appears that the practice is as stated; for expedition the practitioner may make out this writ.

Filazer makes out sci. fa.

On the return of the ca. sa. therefore non est inventus, take same to the filazer as instructions for the sci. fa.; he makes the same out; pay 3s. 4d. seal 7d.; it is to be left at the sheriff's office as in the proceeding by bill.

The alias made out by the attorney.

The alias sci. fa. where the first has been returned nihil, is made out by the practitioner for the reason above mentioned, by merely adding to a copy of the first, words necessary to constitute an alias writ; namely, after we command you, say, "as before," or "as formerly we have commanded you, that," &c. This writ is to be signed by the filazer; pay 3s. 4d. seal 7d.

When rule on sci. fa. to be given.

When it expires.

*The rule on the sci. fa. is given on the quarto die post of the return day of the sci. fa. where one only, and on that of the second when there are two; this rule expires in four days after the quarto die post of such return day; and Sunday, whether the last or an intermediate day, is not reckoned; see *Watken v. Beaumont*, 11 East, 271, cited ante; if no appearance, make the entry on the roll, and take the same to the clerk of the judgments or prothonotaries as before, pay 2s.*

If the defendant appear, it is said it must be with the filazer.

Mr. Impey says there never was an instance of common bail being filed, and it should seem that the practice recommended, ubi supra, would be to appear even to process by bill, with the filazer; but this practice may admit of doubt, although the scire facias may be deemed an original writ; there can be none, however, as to appearing with the filazer, where the filazer has made out the writ of sci. fa. as the practice seems to be undoubted he must, where the proceedings are by original.

*Enter the appearance on a slip of paper with the filazer in the same manner as where a defendant appears to common capias, C. P. Of this appearance it is said notice should be given to the plaintiff's attorney, merely saying that he, the attorney for the bail or the principal, as the case may be, appears to the sci. fa. &c.; but Mr. Tidd seems to think the notice to the attorney sufficient, without any entry with the filazer: but *quære*, see *Tidd*, 1083.*

On appearance with the filazer the cause proceeds in the same manner as if the proceedings were by bill.

The slight, though important variation, where the proceedings are by original, will be mentioned in the FORM, No. 3. The requisite alterations in the remainder of the Forms will be easily recollected by the practitioner; it is therefore judged inexpedient to enhance the bulk of this compilation by further adverting to them, except by inserting here a form of a scire facias by original, varying from that directed by Mr. Impey as to sci. fa. to revive, &c. The practitioner may therefore elect which to adopt. And for entry of judgment by default, or sci. fa. by original, see No. 8, FORMS, subjoined.

FORM.

George the Fourth, by the grace of God, &c. To the sheriff of Middlesex, greeting: Whereas _____ of _____, and _____ of _____, (the bail) heretofore, to wit, in _____ term, in the _____ year of our reign, came into our court, before us at Westminster, in their proper persons, and became pledges and manucaptors, and each of them by himself became pledge and manucaptor for _____, late of _____ (the original defendant) and then and there acknowledged themselves to owe, and each of them did then and there acknowledge himself to owe to _____, (the plaintiff) the sum of £_____, and then and there submitted and granted for himself and his heirs, that the said sum of £_____ should and might be made of their, and each of their lands and chattels, and levied to and for the use of the said _____, (the plaintiff) in case the said _____, (the defendant) should happen to be convicted in a certain plea of debt for £_____, then lately commenced and depending in the said court, by and at the suit of the said _____, (the plaintiff) against the said _____, (the defendant), and if the said _____, (the defendant) should not pay and satisfy unto the said _____, (the plaintiff) as well the said debt or sum of £_____, as all such damages as should be adjudged to the said _____, (the plaintiff) in the plea aforesaid, or render himself to the prison of the marshal of our Marshalsea, before us on that occasion; as by the record of the said recognizance still remaining in our said court, before us at Westminster aforesaid, fully appears: And although the said _____, (the plaintiff) afterwards, to wit, in _____ term, in the _____ year of our reign, in our said court, before us at Westminster aforesaid, by our writ, and by the consideration and judgment of the said court, recovered in the same plea against the said _____, (the defendant) £_____, the said debt, and also £_____, for the damages of the said _____, (the plaintiff) which he had sustained, as well by occasion of detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said _____, (the defendant) is convicted, as by the records and proceedings thereof still remaining in our said court, before us at Westminster aforesaid, more fully appears, yet the said _____, (the defendant) hath not paid or satisfied the said debt and damages, or any part thereof to the said _____, (the plaintiff) or rendered himself to the marshal of the Marshalsea, before us on that occasion, according to the form and effect of the said recognizance, and as well the said recognizance as the said judgment still remain in full force and effect, in no wise set aside, reversed, vacated, paid off, or satisfied, as we have received information from the said _____, (the plaintiff) in our said court, before us; whereupon the said _____, (the plaintiff) hath humbly besought us to provide him a proper remedy in this behalf,

Form of writ of sci. fa. against bail where the recognizance is by original. In debt.

As to this form, see above.

BAIL, *Proceeding against, on Recognizance; FORMS.*

and we being willing that what is just in this behalf should be done, command you, that by honest and lawful men of your bailiwick you make known to the said _____ and _____ (*the bail*) that they be before us _____, (*here insert a general return*), wheresoever we shall be in England, to shew if they have or know of any thing to say for *themselves*, or if either of them have any thing to say for himself, that is to say, the said _____, (*the first named bail*) why the said sum of £_____ by him in form aforesaid acknowledged, should not be made of his lands and chattels, and the said _____, (*the other bail*) why the said sum of £_____ by him in form aforesaid acknowledged, should not be made of his lands and chattels, and levied to and for the use of the said _____, (*the plaintiff*) according to the force, form, and effect of the said recognizance, if it shall seem expedient for him so to do, and further to do and receive what our said court before us shall consider of them in this behalf, and have there the names of those by whom you shall so make known to them, and this writ. Witness Sir Charles Abbott, knight, &c.

Fifteen days between *tests* and return.

FORMS, K. B.

No. 1.
The docket
paper.

The entry (or "further entry" if the same attorney have made other entries of the same term) of *Thomas Styles*, gentleman, one, &c. of _____ term, _____ year of the reign of King George the Fourth,

[Venne] to wit. Recognizance of bail for *R. S.* at the suit of *J. S.* roll _____.

No. 2.
Entry of recogni-
zance on roll,
K. B. in case.

As yet of the term of _____, — Geo. IV. —. Witness, Sir Charles Abbott, knight.

[Venne] to wit. Be it remembered, that on _____ next after _____, in this same term, before our lord the king, at Westminster, comes _____, by _____, his attorney, and brings into the court of our said lord the king, before the king himself now here, his certain bill against _____, being in the custody of the marshal of the Marshalsea of our lord the now king, of a plea of trespass on the case, and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit, London, to wit, (*here copy the declaration to the end, concluding with the words, "Suit, &c."*)

And the said _____, by _____, his attorney, comes and defends the wrong and injury when, &c. and thereupon _____ of _____, and _____ of _____, (*here insert the names and additions of the bail as in recognizance*) came into the court of our lord the king, before the king himself, at Westminster, in their proper persons, and became pledges and bail, and each of them became pledge and bail for the said _____, that if the said _____ shall happen to be convicted at the suit of the said _____, in the plea aforesaid, then the said bail consent, and each of them consents, that all such damages (*if the action shall be in debt, and judgment shall have been recovered on a verdict, say "as well the said debt as all such damages"*); or if in debt, and the judgment shall have been by default, say "did consent, and each of them consents, that as well the said debt as all damages," as shall be adjudged to the said _____ in that behalf, shall be made of their and each of their lands and chattels, and levied to the use of the said _____, if it

shall happen that the defendant shall not pay the said damages, (or if in debt "the said debt and damages,") or render himself on that occasion to the prison of the marshal of the Marshalsea of our said lord the king, before the king himself on that occasion.

George the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the Faith, &c. To the sheriff of Middlesex, greeting: Whereas ———, lately in our court before us, at Westminster, *by bill without our writ*, (if by original, instead of the words in italics, say, "by our writ") and by the judgment of the same court recovered against ———, as well a certain debt of £———, as £——— for his damages which the said ——— had sustained, as well by occasion of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said ——— is convicted, as appears to us upon record, and although judgment be thereupon given, yet execution of the said debt and damages still remains to be made to him: And whereas ——— of ———, and ——— of ———, (*here name the bail, with their additions*) heretofore, to wit, in the term of ———, in the ——— year of our reign, came into our said court, before us, at Westminster, and became pledges and bail in their proper persons, and each of them became pledge and bail for the said ———, that if the said ——— should happen to be convicted at the suit of the said ———, in the plea aforesaid, then the said bail consented, and each of them for himself consented, that as well the said debt as all such damages as should be adjudged to the said ———, in that behalf, should be made of their and each of their lands and chattels, and levied to the use of the said ———, if it should happen that the said ——— should not pay and satisfy the said debt and damages to the said ———, or render himself on that occasion to the prison of the marshal of our Marshalsea, before us, as by the record of the said recognizance, now remaining in our said court, before us, at Westminster, fully appears; yet the said ——— hath not yet paid the said debt and damages, or any part thereof, to the said ———, or on that occasion rendered himself to the marshal of our prison of our Marshalsea, before us, as we have received information from the said ———, wherefore the said ——— hath humbly besought us to provide him a proper remedy in this behalf, and we being willing that what is right and just should be done, command you, that by good and lawful men of your bailiwick, you make known to the said ——— and ——— (*the bail*) that they be before us at Westminster on ——— next after ———, (*if by original, the return must be general, and add "wheresoever we shall then be in England"*) to shew if they have or know, or if either of them hath or knoweth of any thing to say for themselves or himself, why the said ———, (*the plaintiff*) ought not to have his execution against the said ——— and ———; (*the bail*) for the debt and damages aforesaid, according to the force, form, and effect of the said recognizance, if it shall seem expedient for him so to do: And further to do and to receive all and singular those things which our said court, before us, shall then and there consider of them in this behalf, and that you have there *then* (*if by original leave out the word "then"*) the names of those by whom you shall so cause it to be made known to them, and this writ. Witness, Sir Charles Abbott, knight, &c.

No. 3.

Writ of *sci. fa.*
on recognizance
in debt against
the bail only.

BAIL, *Proceeding against, on Recognizance; FORMS, K. B.*

No. 4. Middlesex, to wit. *Scire facias* for _____ against _____, and
 Precipe for above writ. _____ bail of _____ for £_____ debt and £_____ da-
 mages; returnable _____, 182—.

_____, Attorney for plaintiff.

Observation to
 where recogni-
 zance taken be-
 fore commis-
 sioner.

Mr. Tidd seems to doubt whether, in K. B. it be necessary to
 state the fact of the recognizance being taken before a commissioner
 in the country, and cites 2 *Lutw.* 1282. It is however usual in
 C. P.

No. 5.
 Rule on *scire*
facias.

_____ v. _____ and _____.

Rule on *sci. fa.*

June, 182—.

_____, Attorney for plaintiff.

To be written on a slip of paper.

No. 6.
 Entry on roll of
sci. fas. with the
 return of *nihil*
 thereon.
 By bill.

As yet of _____ term, in the _____ year of the reign of
 King George the Fourth. Witness, Sir Charles Abbott, knight.

Middlesex, to wit. Our lord the king sent to his sheriff of
 Middlesex his writ, closed in these words, to wit, George, &c.
(copy the first sci. fa. to the end, then say) At which day, before our
 lord the king, at Westminster, came the said _____ *(the plaintiff)*
 in his proper person, and the sheriff, to wit _____ and _____
 sheriff of the said county, returned to us that the aforesaid _____
 and _____ *(the bail)* had not, nor had either of them, any thing in
 his bailiwick where or by which he could give them, or either of them,
 notice as by the said writ he was commanded; nor were the said
 _____ and _____ *(the bail)* nor was either of them, found in
 the same, and the said _____ and _____, *(the bail)* came not,
 nor did either of them come: Therefore, as before it is commanded
 to the said sheriff, that by good and lawful men of his bailiwick, he
 make known to the said _____ and _____ *(the bail)* that they
 be before our lord the king, at Westminster, on _____ next, after
 _____ to shew in form aforesaid, if, &c. and further, &c. The
 same day is given to the said _____ *(plaintiff)* there, &c. At
 which day, before our said lord the king at Westminster, comes
 the said _____ *(the plaintiff)* in his proper person, and the said
 sheriff, as before, returns that the said _____ and _____ *(the*
bail) had not, nor had either of them, any thing in his bailiwick,
 whereby or by which he could give them, or either of them, notice
 as by the said last-mentioned writ he was commanded, nor were they,
 or either of them, found in the same:* And the said _____ and
 _____ *(the bail)* although on that day solemnly demanded, came
 not, nor did either of them come, but made default: It is therefore
 considered that the said _____ *(the plaintiff)* have his execution
 against the said _____ and _____ *(the bail)* of the damages
 aforesaid, according to the force, form, and effect of the recognizance
 aforesaid, by the default of the said _____ and _____ *(the*
bail) &c.

If the *sci. fas.* be of different terms, the first must be entered
 as of the term wherein it is returnable, and an award of the
 second is sufficient, without setting it forth at large. Docket the
 entry, and request the clerk of the judgments to mark upon the
 first writ the time of the docket, and file the entry with the clerk
 of the Treasury some time in the next term; on the return of the
 second the clerk of the Treasury will enter the award of the judg-
 ment on the same roll after the rule is expired, on leaving the *alias*
 with him for that purpose.

If there be only one *sci. fa.* and it be returned *sci. feci*, set out, and stop at the end of the sheriff's return, on the writ. The entry will be agreeably to No. 6, until the return is to be set out, viz. at the asterisk before. Then say,

No. 7.
Entry on roll of one *sci. fa.* with return of *scire feci*.

"And the said _____ and _____ (*the bail*) although on that day solemnly demanded, did not, nor did either of them come, it is therefore considered that the said _____ (*the plaintiff*) have his execution against the said _____ and _____ (*the bail*) of the damages aforesaid, according to the force, form, and effect of the said recognizance, by the default of the said _____ and _____ (*the bail*) &c."

As yet of _____ term (*the term when the bail made default upon the sci. fa.*) in the _____ year of the reign of king George the Fourth. Witness, Sir Charles Abbott, knight.

No. 8.
Entry of judgment by default on *sci. fa.* against bail.
By original.

[Venue] to wit. _____ against _____ and _____, bail of _____ and _____, in a plea of debt on *scire facias*.

[Venue] to wit. The said _____ and _____ put in their place _____, their attorney, at the suit of the said _____ in the plea aforesaid.

[Venue] to wit. Our lord the king sent to his sheriff of Middlesex, his writ, closed in these words, that is to say, George [&c. insert declaration, on the *sci. fa.* to the end, and then on a new line]

And the said _____ and _____ pray a day to imparl to the said declaration of the said _____, and it is granted to the, &c. And upon this a day is given to the parties aforesaid, before our lord the king, until the [*a general return day on or subsequent to the day, the defendant would have in court to imparl*] wheresoever our said lord the king shall then be in England, that is to say, for the said _____ and _____ to imparl to the declaration aforesaid, and then to answer the same. At which day before our said lord the king at Westminster comes the said _____ in his proper person, and offers himself on the fourth day against the said _____ and _____ in the plea aforesaid. And the said _____ and _____, although on that day solemnly demanded, came not, nor doth either of them come, nor do they or either of them, shew or say any thing why the said _____ should not have execution against them and each of them respectively for the aforesaid sum of £_____, according to the force, form, and effect of the aforesaid recognizance, whereby the said _____ remains therein undefended against the said _____ and _____. Therefore it is considered that the said _____ have his execution against the said _____ and _____ respectively, that is to say, against the said _____ of the said sum of £_____ by him in form aforesaid acknowledged, and against the said _____, of the said sum of £_____, by him in form aforesaid acknowledged, according to the force, form, and effect of the aforesaid recognizance, by the default of the said _____ and _____, &c.

Middlesex, to wit. Appearance for _____ and _____ bail of _____ (*the defendant*) at the suit of _____ (*the plaintiff*) to a _____ (or *an alias, as the case may be*) *sci. fa.* returnable _____ (Date) _____, attorney for the bail.

No. 9.
Precipe for appearance to *sci. fa.*

[Court.]

[Term.]

No. 10.

Middlesex, to wit. Our lord the king sent to his sheriff of _____, his writ, closed in these words, to wit, George the Fourth

Declaration on *sci. fa.*

BAIL, Proceeding against, on Recognizance: FORMS, K.B.

(copy the first sci. fa. and the return, and the award of the second, down as far as the asterisk, page 222,) &c. (Then proceed) At which day, before our said lord the king, at Westminster, came, as well the said _____ (plaintiff) in his proper person, as the said _____ and _____, (bail) by _____ their attorney; upon which the said _____ (plaintiff) prays that execution may be adjudged to him of the damages aforesaid, according to the force, form, and effect of the said recognizance, &c.

No. 11.
Fieri facias
against bail in
case.

George the Fourth, &c. To the sheriff of Middlesex, greeting: We command you, that of the goods and chattels in your bailiwick, of _____ and _____ the bail of _____ (defendant) you cause to be made £_____ (if in debt, say "as well a certain debt of £_____") which _____ (plaintiff) lately in our court, before us, at Westminster, recovered against the said _____ (defendant) (if in debt, leave out the words in italic, and say "as also £_____ which were awarded to the said _____ (plaintiff) in our same court, before us, for his damages which he sustained as well by occasion of the detaining the said debt") for his damages which he sustained as well by means of the not performing certain promises and undertakings lately made by the said _____ (defendant) to the said _____ (plaintiff) as for his costs and charges by him about his suit in that behalf expended, whereof the said _____ (defendant) is convicted, as appears to us of record: and whereupon it was considered in our same court, before us, that the said _____ (plaintiff) have his execution against the said _____ and _____ (bail) for the said (if in debt, say "debt and" leave out the words in italic) damages, costs and charges, according to the force, form and effect of a certain recognizance, acknowledged by the said _____ and _____ (bail) in our said court, before us for the said _____ (plaintiff) at the suit of the said _____ (plaintiff) in the plea aforesaid, by the default of the said _____ and _____ (bail) as likewise appears to us of record, and have you that money, before us, at Westminster, on _____ next after _____, to be rendered to the said _____ (plaintiff) for his (if in debt say, "debt and" leave out the words in italic) damages, costs, and charges, aforesaid,* and have there then this writ. Witness, Sir Charles Abbott, knight.

No. 12.
Capias ad satisfaciendum
against
bail in case, after
default in action
upon the recog-
nizance.

George the Fourth. To the sheriff of Middlesex, greeting: We command you, that you take _____ and _____ the bail of _____ if they be found in your bailiwick, and safely keep them, so that you have their bodies before us, at Westminster, on _____ next after _____, to satisfy _____ (plaintiff) £_____ (if in debt, say "as well a certain debt of £_____") which the said _____ (plaintiff) lately in our court, before us, recovered against the said _____ (defendant) (if in debt, leave out the words in italic, and say, "as also £_____ which were adjudged to the said _____ (plaintiff) in our said court, before us, for his damages which he sustained, as well by occasion of the detaining the said debt") for his damages which he sustained, as well by means of the not performing certain promises and undertakings lately made by the said _____ (defendant) to the said _____ (plaintiff) as for his costs and charges by him about his suit in that behalf expended, whereof the said _____ is convicted, as appears to us of record: And whereupon it was considered in our same court before us that the said _____ (plaintiff) have his execution against the said _____ and _____ (bail) for the said (if in debt, say, "debt and" leave out the words in italic) damages, costs, and charges, according to the

force, form, and effect of a certain recognizance, acknowledged by the said _____ and _____, (*bail*) in our said court, before us, for the said _____, (*defendant*) at the suit of the said _____, (*plaintiff*) in the plea aforesaid, by the default of the said _____ and _____, (*bail*) as likewise appears to us of record *, and have you then there this writ. Witness, Sir Charles Abbott, knight, at Westminster, the _____ day of _____, in the _____ year of our reign.

George the Fourth, &c. Whereas we lately commanded our sheriff of _____, [*Here recite to, and stop at the asterisk * in No. 11, ante, p. 224*], then add, and our sheriff of Middlesex, at a certain day now past, returned to us, that the said _____ and _____, (*the bail*) had not, nor had either of them, any goods or chattels in his bailiwick, whereof he could cause to be levied the damages aforesaid, or any part thereof; whereas it is testified in our same court, before us, that the said _____, and _____ (*the bail*), have sufficient goods and chattels in your bailiwick, whereof you may cause to be levied the damages aforesaid, and every part thereof. Therefore we command you, that of the goods and chattels of the said _____, and _____, in your bailiwick, you cause to be made the said £_____, the damages aforesaid, and that you have that money before us at Westminster, on _____, to be rendered to the said _____, for his damages aforesaid; and have there then this writ. Witness, Sir Charles Abbott, knight.

No. 13.
Testatum fieri facias against bail in case.

*Copy to, and stop at the asterisk * No. 12, then say,* And our sheriff of Middlesex, at a certain day now past, returned to us, that the said _____ and _____, (*the bail*) were not, nor was either of them found in his bailiwick, whereupon on the behalf of the said _____, (*the plaintiff*) it is sufficiently testified in our same court, before us, that the said _____ and _____, (*the bail*) lurk and secrete themselves in your county; and have there then this writ. Witness Sir Charles Abbott, knight.

No. 14.
Testatum capias ad satisfaciendum, against bail in case.

George, &c. To the sheriff of _____, greeting. Whereas we lately commanded our sheriff of _____, that of the goods and chattels of _____, in his bailiwick, he should cause to be made £_____; and of the goods and chattels of _____, in his bailiwick, he should cause to be made £_____, and that he should have the said monies before us on a certain day now past, wheresoever we should then be in England, to be rendered to _____, according to the force, form, and effect of a certain recognizance, by the said _____ and _____, respectively acknowledged to the said _____, as bail of and for _____ and _____, before _____, our commissioners, lawfully authorised and appointed to take bails in our court before us, in and for your county, according to the form of the statute in that case made and provided, as by the record of the said recognizance, which was afterwards in due manner transmitted to the right honourable Sir Charles Abbott, knight, Chief Justice of our court, before us, at his chambers, situate in Serjeant's Inn, Chancery-lane, London, and was by the said chief justice produced and recorded in the same court, and is now there remaining, as appears to us of record. And whereupon it was considered in our said court, before us, at Westminster, that the said _____ should have his execution against the said _____ and _____ respectively, that is to say, against the said _____, of the sum of £_____, by him in form acknowledged, and against the said _____,

No. 15.
Testatum fieri facias, against both the bail respectively, after judgment on acire facias, on a recognizance taken before a commissioner in the country. By original.

BAIL, Proceeding against, on Recognizance; FORMS, K. B.

of the sum of £——, by him in form aforesaid acknowledged, according to the force, form, and effect of the aforesaid recognizance, by the default of the said —— and ——, as otherwise appears to us of record; and our said sheriff of ——, at that day returned to us, that the said —— and —— had not, nor had either of them, any goods or chattels in his bailiwick, whereof he could cause to be made the said several sums of £—— and £——, or either of them, or any part thereof; whereupon, on the behalf of the said ——, it is sufficiently testified in our said court before us, that the said —— and —— have sufficient goods and chattels in your bailiwick, whereof the said several sums of £—— and £——, and each of them, and every part thereof, may be fully made. Therefore we command you, that of the goods and chattels of the said —— and ——, in your bailiwick, you cause to be made the said several sums of £—— and £——, in form aforesaid acknowledged, so that you may have the said monies before us in [a general return], wheresoever we shall then be in England, to be rendered to the said ——, according to the form and effect of the recognizance aforesaid, and have there this writ. Witness, [&c. fifteen days between the teste and return. Indorse. Levy [the sum recovered, and costs in the action], sheriffs' fees, poundage, &c.

—— term, in the —— year, &c.

No. 16.

Form of declaration against one bail on recognizance taken in K. B. where proceeding is by action*.

Middlesex, to wit, —— complains of ——, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that the said —— render to the said —— £—— of lawful money of Great Britain, which the said —— owes to, and unjustly detains from him, &c.: For that whereas the said ——, heretofore, to wit, in —— term, in the —— year of the reign of our lord the new king, in the court of his said majesty, before the king himself, here, (to wit, at Westminster, in the county of Middlesex), by bill without the writ of his said majesty, and by the judgment of the said court, recovered against ——, as well his certain debt of £——, as also £——, for his damages, which he had sustained as well on occasion of the detaining of that debt as for his costs and charges by him about his suit in that behalf expended, whereof the said —— was convicted, as by the record and proceedings thereof still remaining in the court of our said lord the king, here, to wit, at Westminster aforesaid, more fully appears, which said judgment still remains in the said court here in its full force and effect, not in the least reversed, set aside, vacated, paid, or satisfied: And whereas, whilst the said plea was depending in the said court of our said lord the king, before the king himself here, that is to say, in —— term, in the —— year of the reign of his said majesty, the said —— came personally into the said court here, and then and there in the same court, by the name of ——, of ——, became a pledge for the said ——, that if it should happen that the said —— should be convicted at the suit of the

* N. B. As the action against the bail depends upon the record of a judicial proceeding previously instituted against the principal, I have preferred the older mode of declaring to that more recently adopted by some pleaders. In the later mode, the facts, as to the order of time, are inverted; for the action against the

principal existed previously to the recognizance being recorded; yet the modern declaration states the record of the recognizance, the ground of the action against the bail, in the first part of the declaration. As to arrangement of facts in a declaration, see preface to Mr. Lawes's work upon Pleading.

said ——— in the aforesaid plea, then the said ——— consented, that as well the said debt, as all such damages, costs, and charges as should be adjudged to the said ———, in that plea, should be made of his lands and chattels, and levied to the use of the said ———, if it should happen that the said ———, (*original defendant*) should not pay the said debt and damages, costs, and charges, or render himself to the marshal of his said majesty's prison of the Marshalsea, before the king himself, on that occasion, as by the record of the aforesaid recognizance now remaining in the said court here fully appears, which said recognizance still remains in force, strength, and effect, not annulled, vacated, or in any wise satisfied, and the said ——— hath not as yet obtained any execution either of the said judgment, or of the said recognizance; and the said ——— further saith, that the said ——— hath not yet paid to the said ——— the said debt and damages so recorded as aforesaid, or any part thereof, nor rendered himself to the marshal of his majesty's said prison of the Marshalsea, before the king himself, on that occasion, according to the form and effect of the said recognizance; by reason whereof an action hath accrued to the said ———, to demand and have of and from the said ———, (*the one bail*) the said £——, to wit, the debt and damages recovered in form aforesaid; yet the said ———, (although often requested) hath not yet paid the said £——, or any part thereof, to the said ———, but to pay the same to him hath hitherto altogether refused, and still doth refuse, to the damage of the said ———, of £——, and therefore he brings suit, &c.

Pledges, &c.

——— term, in the ——— year, &c.

No. 17.

Middlesex, to wit, ——— and ———, complain of ——— and ——— being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that they render to the said ——— and ———, £—— of lawful money of Great Britain, which they owe to, and unjustly detain from them: For that whereas the said ——— and ———, on the ——— day of ———, in the year of our Lord ———, came in their proper persons, before the honourable ———, one of the justices of our lord the king, assigned to hold pleas before the king himself, at his chambers in Serjeants' Inn, Chancery-lane, London, and according to the form of the statute in such case made and provided, acknowledged themselves, and each of them separately did acknowledge himself, to owe to the said ——— and ———, the sum of £——, of lawful money of Great Britain, to be paid to the said ——— and ———, their executors, administrators, or assigns, and unless the said ——— and ———, (*bail*) should so do, the said ——— and ——— did grant and agree; and each of them for himself did grant and agree, that the said sum of £—— should be made of their, and each of their lands and chattels, and levied to the use of the said ——— and ———, upon condition, nevertheless, reciting that the aforesaid ——— and ———, lately in the court of our said lord the king, before the king himself, at Westminster, by bill, without the writ of our said lord the king, and by the judgment of the same court, recovered against ———, £—— for their damages, which they had sustained, as well by means of the not performing certain promises and undertakings, then lately made by the said ——— to the said ——— and ———, as for their costs and charges by them about their suit in that behalf expended,

Declaration on recognizance of bail in error against the bail, after affirmance of judgment of K. B. in the Exchequer Chamber.

BAIL, *Proceeding against, on Recognizance*; FORMS, K. B.

whereof the said ——— had been convicted, as appeared on record in the said court of our lord the king, before the king himself, at Westminster: And also reciting, that whereas the said ———, (*original defendant*) had brought a writ of error upon the judgment aforesaid, returnable before the justices of our lord the king of the Common Bench, and the barons of his Exchequer, of the degree of the coif in the Exchequer Chamber of our lord the king, on ———, the ——— day of ———, in the ——— year aforesaid; if therefore, the said ——— should prosecute the said writ of error with effect, and also should satisfy and pay to the said ——— and ———, if the said judgment should be affirmed, or the said writ of error should be discontinued in his default, or he should be nonsuit therein, as well the damages, costs, and charges aforesaid, adjudged upon the said judgment, as also all such costs, charges, and damages, as should be awarded to the said ——— and ———, for the delay of execution of the judgment aforesaid, by pretext of prosecuting the said writ of error, then the recognizance aforesaid was to be void, or else to be and remain in full force and virtue, which said recognizance, and the condition thereof, afterwards, on ——— next, after ———, in the year ———, by the said justice was recorded in the said court of our lord the now king, before the king himself, at Westminster, as by the record of the said recognizance, and the condition thereof, now remaining in the said court of our lord the now king, before the king himself here, manifestly appears; and such proceedings were had upon the said writ of error, that afterwards, that is to say, in the court of Exchequer Chamber of our said lord the king aforesaid, before the then justices of our said lord the now king of his Common Bench, and the then barons of the Exchequer of our said lord the king, of the degree of the coif, that afterwards, to wit, on ———, the ——— day of ———, in ——— term, in the ——— year of the reign of our lord the now king, the judgment aforesaid was in all things duly affirmed, and it was, by the consideration of the same court of Exchequer, adjudged that the said ——— and ——— should recover against the said ———, £——, adjudged to the said ——— and ———, and at their request, according to the form of the statute in such case made and provided, for their damages, costs, and charges, which they had sustained and expended, by reason of the delay of the execution of the judgment aforesaid, and by the prosecution of the said writ of error, as by the record and proceedings thereof, remitted by the said justices and barons from the said court of Exchequer Chamber into the said court of our said lord the now king, before the king himself, at Westminster aforesaid, according to the form of the statute in such case made and provided, and now remaining in the said court of our lord the now king, before the king himself, at Westminster aforesaid, may more fully appear: And the said ——— and ——— further say, that the said ———, (*original defendant*) hath not yet paid to the said ——— and ———, or to either of them, the said damages upon the said first mentioned judgment, and the said £——, which were awarded to them for their damages, costs, and charges in the said court of Exchequer Chamber aforesaid, or any part thereof; and the said ——— and ——— have not yet obtained any execution against the said ——— and ———, (*bail in error*) or against either of them, upon the aforesaid recognizance, and that the said recognizance, in form aforesaid acknowledged, still remains in full force and effect, in no wise reversed, exonerated, or discharged, whereby an action

bath accrued to the said _____ and _____, to demand and have of and from the said _____ and _____, the said sum of £____, above demanded; yet the said _____ and _____, although often requested so to do, have not, nor hath either of them, yet paid the said sum of £____, or any part thereof, to the said _____ and _____, or to either of them, but the said _____ and _____, (bail) to pay the same, or any part thereof, to the said _____ and _____, or to either of them, have, and each of them hath, hitherto wholly refused, and still do, and each of them still doth, refuse so to do, to the damage of the said _____ and _____, of £____, and therefore they bring suit, &c.

Pledges, &c.

PRACTICAL DIRECTIONS, C. P.

The steps taken previously to commencing an action of debt on the recognizance, and the issuing of the sci. fa. are the same, mutatis mutandis, in both courts, except that in K. B. the entry of the recognizance is made by the attorney; and that in C. P. it is made by the filazer, at the instance of the attorney. It is observed that the practice of late has been to proceed before the entry; it being sufficient that the recognizance be entered before replication of nul tiel record: but it is added, that the safest way will be to get the filazer to make the entry before the cire facias be sued out. Imp. C. P. pa. 532, 4th edit.; although it is also said, the prothonotary dispenses with the entry on the remembrance roll.

See FORMS, C. P. subjoined; amongst which will be found Forms in proceeding against bail on habeas corpus cum causa, viz. the entry of the recognizance thereon, and the writ of scire facias. A Form of a declaration on recognizance of bail for an assault is added, No. 16.

FORMS, C. P.

Middlesex, to wit. The sheriff was commanded that he should take _____, late of _____, (describe the defendant as in the proceedings), if he should be found in his bailiwick, and him safely keep, so that he should have his body before the justices of the lord the king, at Westminster _____, (the return of the capias) to answer _____, (the plaintiff) in a plea, wherefore with force and arms the close of the said _____, at Westminster, he broke, &c. and other wrongs, &c. to the great damage, &c. and against the peace, &c.; and also in a certain plea of debt upon demand for £____, afterwards, to wit, on the _____ day of _____, in this same term, _____, of _____, and _____, of _____, (the bail) came personally before the right honourable Robert Lord Gifford, (the chief justice) and his companions, justices of the lord the king of the Bench, here, and acknowledged themselves, and each of them did acknowledge himself, to owe to the said _____, (the plaintiff) the sum of £____, which said sum of £____, the said _____ and _____, (the bail) for themselves and their heirs, have consented and granted, and each of them for himself and his heirs hath consented and granted, shall be made of their, and each of their lands and chattels, and to the use and behoof of the said _____, (plaintiff) be levied; upon condition that if judgment shall happen in the same court here in the said plea to be given for the said _____, (plaintiff) against the said _____, (defendant) then the said _____, (defendant) shall satisfy the debt aforesaid, and all such damages which shall be adjudged unto the said _____, (plaintiff) against the said _____, (defendant) in the

No. 1.

Entry of recognizance of bail in debt to be made on the filazer's roll.

No. 2.

The like in case.

The entry is usually made thus; but the day may be stated.

same court here, in the plea aforesaid, or shall render his body on that occasion to the prison of the Fleet, &c.

Middlesex, to wit. The sheriff was commanded that he should take _____, (*defendant*) late of _____, in the said county of _____, if he should be found in his bailiwick, and him safely keep, so that he might have his body before the justices of the lord the king at Westminster, _____ (*return of capias*) to answer to _____, in a plea, wherefore with force and arms the close of the said _____, at Westminster, the said _____ broke, and other wrongs, &c. to the great damage, &c. and against the peace, &c. and also in a certain plea of trespass on the case upon promises to the damage of the said _____, (*plaintiff*) of £_____. And now here on this day come _____, of _____, and _____, of the same place _____, (*bail*) in their proper persons, before Robert Lord Gifford, (*the chief justice*) and his companions, justices of the Bench, here, and acknowledge, and each of them acknowledges, that he owes to the said _____, (*plaintiff*) the sum of £_____, which said sum of £_____, the said _____ and _____, (*bail*) for themselves and their heirs, have consented and granted, and each of them for himself and his heirs hath consented and granted, shall be made of their, and of each of their lands and chattels, and to the use and behoof of the said _____, (*plaintiff*) be levied; upon this condition, that if judgment shall happen in the same court here, in the said plea to be given for the said _____, (*plaintiff*) against the said _____, (*defendant*) then the said _____, (*defendant*) shall satisfy all such damages as shall be adjudged to the said _____, (*plaintiff*) against the said _____, (*defendant*) in the same court here in the plea aforesaid, or shall render his body on that occasion to the prison of the Fleet, &c.

No. 3.

Scire facias against the bail, upon the recognizance acknowledged in court, or before a judge. In debt.

George the Fourth, &c. To the sheriff of Middlesex, greeting: Whereas _____, of _____, and _____, of _____, (*bail*) lately in our court, (to wit) in the term of _____, in the _____ year of our reign, came before Robert Lord Gifford and his companions, our justices of the Bench at Westminster, in their proper persons, and acknowledged themselves, and each of them did acknowledge himself, to owe to _____, (*plaintiff*) the sum of £_____, which said sum of £_____, the said _____, and _____, (*bail*) for themselves and their heirs consented and granted, and each of them for himself and his heirs did consent and grant, should be made of their and each of their lands and chattels, and to the use and behoof of the said _____, (*plaintiff*) be levied; upon this condition, that if judgment should happen in our court of the Bench aforesaid, in a certain plea of debt upon demand, for £_____, to be given for the said _____, (*plaintiff*) against the said _____, (*defendant*) by the said _____, (*plaintiff*) in our court prosecuted, then the said _____, (*defendant*) should satisfy the debt aforesaid, and all such damages as should be adjudged unto the said _____, (*plaintiff*) against the said _____, (*defendant*) in our same court here, or should render his body on that occasion to the prison of the Fleet; and although the said _____, (*plaintiff*) afterwards, to wit, in that same term, before Robert Lord Gifford and his companions, our justices of the Bench, at Westminster, by the consideration of the same court, recovered against the said _____, (*defendant*) in the said plea, the aforesaid debt of £_____, and also £_____, which in our said court were adjudged to the said _____, (*plaintiff*) for his damages which he had sustained by the detaining that debt, whereof the said _____, (*defendant*) is convicted, as by the

record and process thereof now remaining in our same court, manifestly appeareth, nevertheless the said ———, (*defendant*) the debt and damages aforesaid to the said ———, (*plaintiff*) hath not satisfied, nor the body of the said ———, on the occasion aforesaid, to the prison of the Fleet rendered * according to the form of the recognizance aforesaid, as on the information of the said ———, (*plaintiff*) we are given to understand: and because we are willing that those things which in our same court are rightly done and recognized should be duly carried into execution, we command you, that by honest and lawful men of your bailiwick, you make known to the said ——— and ———, (*bail*) that they be before our justices at Westminster ———, to shew if the said ——— and ——— have or know anything to say for themselves; that is to say, the said ———, (*bail first named*) why the said £——, by him in form aforesaid acknowledged, should not be made of his lands and chattels, and to the use of the said ———, (*plaintiff*) be levied, and the said ———, (*bail next named*) why the said £——, by him in form aforesaid acknowledged, should not be made of his lands and chattels, and to the use of the said ———, (*plaintiff*) be levied, according to the force, form, and effect of the said recognizance, if to him it shall seem expedient: And have you there the names of those by whom you shall make known to them, and this writ. Witness, Robert Lord Gifford, &c.

George the Fourth, &c. To the sheriff of Middlesex, greeting: Whereas ———, of ———, and ———, of ———, (*bail*) lately in our court, to wit, in the term of ———, in the ——— year of our reign, came before Robert Lord Gifford and his companions, our justices of the Bench at Westminster, in their proper persons, and acknowledged, and each of them acknowledged, to owe to ———, (*plaintiff*) the sum of £——, which said sum of £——, the said ——— and ———, (*bail*) for themselves and their heirs had consented and granted, and each of them for himself and his heirs had consented and granted, should be made of their and each of their lands and chattels, and to the use and behoof of the said ———, (*plaintiff*) be levied; upon this condition, that if judgment should happen in our court of the Bench aforesaid, in a certain plea of trespass upon the case upon promises to the damage of the said ———, (*plaintiff*) of £——, to be given for the said ———, (*plaintiff*) against ———, (*defendant*) late of ———, in the said county ———, (*as in the proceedings*) then the said ———, (*defendant*) should satisfy all such damages which should be adjudged to the said ———, (*plaintiff*) against the said ———, (*defendant*) in our same court, in the plea aforesaid, or should render his body on that occasion to the prison of the Fleet: and although the said ———, (*plaintiff*) afterwards, to wit, in the said term, in the ——— year aforesaid, before Robert Lord Gifford and his companions, our justices of the Bench, at Westminster, by the consideration of the same court recovered against the said ———, (*defendant*) in the said plea, (*insert the amount of the debt and costs*) £——, which in our said court were adjudged to the said ———, (*plaintiff*) for his damages which he had sustained by reason of the not performing certain premises and undertakings made by the said ———, (*defendant*) to the said ———, (*plaintiff*) whereof the said ———, (*defendant*) is convicted, as by the record and process thereof now remaining in our same court manifestly appears; yet the

No. 4.
Scire facias
against the bail.
In case.

BAIL, Proceeding against, on Recognizance; FORMS, C.P.

said ———, (*defendant*) the damages aforesaid hath not satisfied, nor his body on the occasion aforesaid to the said prison of the Fleet rendered. Conclude, from asterisk, in the FORM, No. 3.

No. 5.
Entry of one
scire facias, and
judgment there-
on, against the
bail. In debt.
Recognizance
taken in court.

Middlesex, to wit. The sheriff was commanded: Whereas ———, of ———, and ———, of ———, (*bail*) lately in the court of our lord the king, to wit, in the term of ———, in the ——— year of his reign, came before Robert Lord Gifford and his companions, then our said lord the king's justices of the Bench, at Westminster (*If the recognizance were taken at chambers, after the name say, "chief justice of the Bench, at his chambers in Serjeants' Inn, Chancery Lane, London"*) and acknowledged, and each of them did acknowledge himself to owe to ———, (*plaintiff*) the sum of £——, which said sum of £—— the said ——— and ———, (*bail*) for themselves and their heirs, consented and granted, and each of them for himself and his heirs did consent and grant, should be made of their and each of their lands and chattels, and to the use and behoof of the said ———, (*plaintiff*) be levied; upon condition, that if judgment should happen in the same court of the Bench aforesaid, in a certain plea of debt upon demand for £——, to be given for the said ———, (*plaintiff*) against the said ———, (*defendant*) ——— by the said ———, (*plaintiff*) in the same court prosecuted, then the said ———, (*defendant*) should satisfy the debt aforesaid, and all such damages as should be adjudged unto the said ———, (*plaintiff*) against the said ———, (*defendant*) in the same court, here, or should render his body on that occasion to the prison of our said lord the king, of the Fleet; and although the said ———, (*plaintiff*) afterwards, to wit, in that same term, before Robert Lord Gifford and his companions, then our said lord the king's justices of the Bench, at Westminster, by the consideration of the court recovered against the said ———, (*defendant*) in the said plea, the aforesaid debt of £——, and also ———, which in the same court were adjudged to the said ———, (*plaintiff*) for his damages which he had sustained by reason of the detaining that debt, whereof the said ———, (*defendant*) is convicted, as by the record and process thereof, now remaining in the same court, manifestly appears. Yet the said ———, (*defendants*) the debt and damages aforesaid to the said ———, (*plaintiff*) hath not satisfied, nor his body on the occasion aforesaid to the prison of the Fleet rendered, according to the form of the recognizance aforesaid, as on the information of the said ———, (*plaintiff*) our said lord the king is given to understand: And because, &c. that by good, &c. he should make known to the said ——— and ———, (*bail*) that they be here ———, to shew if they have or know any thing, &c. that is to say, the said ———, (*bail first named*) to shew why the said £——, by him in form aforesaid acknowledged, should not be made of his lands and chattels, and to the use and behoof of the said ———, (*plaintiff*) be levied, and the said ———, (*the other bail*) why the said £——, by him in form aforesaid acknowledged, should not be made of his lands and chattels, and to the use of the said ———, (*plaintiff*) levied, according to the form and effect of the said recognizance, if, &c.* and now at this day the said ———, (*plaintiff*) cometh here by ——— his attorney, and offers himself on the fourth day against the said ——— and ———, (*bail*) in the plea aforesaid, and the said ——— and ———, although solemnly called, came not, and the sheriff now returns that he hath made known to

the said _____ and _____, (*bail*) that they be here on the day in the said writ mentioned. And thereupon the said _____, (*plaintiff*) prays execution † against the said _____ and _____, (*bail*) to wit, against the said _____, (*bail first named*) of the said £____, by him in form aforesaid acknowledged, and against the said _____, (*the other bail*) of the said £____, by him in form aforesaid acknowledged, according to the form of their recognizance to be adjudged to him, &c. Therefore it is considered that the said _____, (*plaintiff*) have execution against the said _____ and _____, (*bail*) that is to say, against the said _____, (*bail first named*) of the said £____, by him in form aforesaid acknowledged, and against the said _____, (*the other bail*) of the £____, by him in form aforesaid acknowledged, by their default, &c.

The sheriff's return of *scire facias*.

Go on as in the last precedent, down to the asterisk, page, 234: And now at this day cometh here the said _____, (*plaintiff*) by _____ his attorney, and offers himself on the fourth day against the said _____ and _____, (*bail*) in the plea aforesaid, and although solemnly called, they came not, and the sheriff now returneth that the said _____ and _____, (*bail*) have not, nor hath either of them, any thing, &c. nor are they, nor is either of them, found, &c. Therefore, as before, the sheriff was commanded, that by good, &c. he should make known to the said _____ and _____, (*bail*) that they be here in _____ to shew in form aforesaid. At which day the said _____, (*plaintiff*) comes by his said attorney, and offers himself on the fourth day against the said _____ and _____, (*bail*) in the plea aforesaid, and they, although solemnly called, came not: and the sheriff, as before, now returns that the said _____ and _____, (*bail*) have not, nor hath either of them, any thing, &c. nor are they, nor is either of them, found, &c. And thereupon the said _____, (*plaintiff*) prays execution (*as in the last precedent from †, supra.*)

No. 6.

Entry of two writs *scire facias*, both of the same term against the bail.

Middlesex, to wit. Heretofore, as it appears in the term of _____ last past, on the _____ (*number*) roll, it is thus contained: Middlesex (to wit). The sheriff was commanded (*go on and finish the entry on the roll of the first scire facias, and add the sheriff's return.*) Therefore, as before, the sheriff was commanded that by good, &c. he should make known to the said _____ and _____, (*bail*) that they be here on _____ to shew in form aforesaid: at which day comes the said _____, (*plaintiff*) by his said attorney, &c. (*copy the last precedent from the word "attorney."*)

No. 7.

The like of different terms.

Middlesex, to wit. Appearance for _____ and _____, bail _____, at the suit of _____, (*plaintiff*) to a *scire facias* (*if to the alias, say, "to alias sci. fa."*) returnable _____.

No. 8.

Note for appearance to *scire facias*.

_____ term, in the _____ year of the reign of King George the Fourth.

No. 9.

Middlesex, to wit. It was commanded to the sheriff: Whereas (*here go to the end of the entry on the roll of the second sci. fa. if two were issued; if only one, then to the end of the entry of that one, as far as the sheriff's return, then proceed as follows.*) And now here at this day came as well the said _____, (*plaintiff*) by _____ his attorney, as the said _____ and _____, (*bail*) by _____ their attorney, and the said _____, (*plaintiff*) offered himself on the fourth day against the said _____ and _____, (*bail*) in the plea aforesaid; and upon this the said _____, (*plaintiff*) prays execu-

Declaration on *scire facias* against bail. It may be entitled generally, although *scire facias* shall have been returnable in the term.

RAIL, *Proceeding against, on Recognizance; FORMS, C. P.*

No. 10.
Ca. ss. against
the bail in debt.

tion against the said _____ and _____, (*bail*) to be adjudged to him of the debt and damages aforesaid, according to the force, form, and effect of the said recognizance, &c.

George the Fourth, by the grace of God, &c. to the sheriff of Middlesex, greeting: We command you that you take _____, late of _____, and _____, late of _____, bail of _____, (*the original defendant*) (*describe the bail and principal as in the recognizance and proceedings*) late of _____, if they be found in your bailiwick, and them safely keep, so that you may have their bodies before our justices at Westminster, _____ (*the return*) to satisfy _____, (*plaintiff*) £— and £—, which several sums the said _____ and _____, (*bail*) heretofore, to wit, in the term of _____, in the _____ year of our reign, before Robert Lord Gifford and his companions, then our justices of the Bench at Westminster, severally acknowledged to owe to the said _____, (*plaintiff*) to be made of their and each of their lands and chattels, and to the use and behoof of the said _____, (*plaintiff*) be levied in a certain plea of debt upon demand for £— against the said _____, (*the original defendant*) in our same court prosecuted. And whereof the said _____, (*the original defendant*) was convicted; as by the record and proceedings thereon in our same court, before our said justices at Westminster aforesaid remaining, manifestly appears; and whereupon it is considered in our same court, that the said _____, (*plaintiff*) have his execution against the aforesaid _____ and _____, (*bail*) of the said several sums of £— and £—, by them in form aforesaid acknowledged, by the default of the said _____ and _____, (*bail*) whereof they are convicted, and have there this writ. Witness, Robert Lord Gifford, at Westminster, the _____ day of _____, in the _____ year of our reign.

No. 11.
Where original
action was in
assumpsit. Ac-
tion in debt
against the bail;
not by *scire*
facias.

George the Fourth, by the grace of God, &c. To the sheriff of Middlesex, greeting: We command you that you take _____ of _____, and _____ of _____, bail of _____, (*describe the bail and defendant, as in the proceedings*) if they be found in your bailiwick, and them safely keep, so that you may have their bodies before our justices at Westminster, _____ (*the return*) to satisfy £— and £—, which several sums the said _____ and _____ heretofore, to wit, in the term of _____, in the _____ year of our reign, before Robert Lord Gifford and his companions, then our justices of the Bench at Westminster, severally acknowledged to owe to the said _____, (*plaintiff*) to be made of their, and each of their lands and chattels, and to the use and behoof of the said _____, (*plaintiff*) be levied in a certain plea of trespass on the case on promises to the damage of the said _____, (*plaintiff*) of £—, against the said _____, (*defendant*) in our same court prosecuted, and whereof the said _____, (*defendant*) was convicted, as by the record and proceedings thereon in our same court before our said justices at Westminster aforesaid remaining, manifestly appears; and whereupon it is considered in our same court, that the said _____, (*plaintiff*) have his execution against the aforesaid _____ and _____, (*the bail*) of the said several sums of £— and £—, by them in form aforesaid acknowledged, by the default of the said _____ and _____, (*the bail*) whereof they are convicted, and have there this writ. Witness, Robert Lord Gifford, at Westminster, the _____ day of _____, in the _____ year of our reign.

If the levy is to be made in another county, and a *testatum* shall be therefore necessary, after the words "by the default of the said ——— and ———, (*the bail*) whereof they are convicted," say, "And whereupon our sheriff of Middlesex sent to our justices at Westminster, at a certain day now past, that the said ——— and ———, (*the bail*) were not, nor was either of them found, in his bailiwick; whereas it is testified in our same court, that the said ——— and ———, (*the bail*) lurk and secrete themselves in your county, and have there this writ. Witness, Robert Lord Gifford, &c.

No. 12.

Testatum ca. sa.

Observe that a *ca. sa.* must be issued to warrant the *testatum* in every case, unless the levy be to be made in the county where the venue is laid, as before observed.

Observation,

George the Fourth, &c. To the sheriff of Middlesex, greeting: We command you that you cause to be made of the lands and chattels in your bailiwick of ———, late of ———, (*the first bail*) £——, and of the lands and chattels in your bailiwick of ———, (*the other bail*) late of ———, other £——, which said several sums, the said ——— and ———, (*bail*) heretofore, to wit, in the term of ———, in the ——— year of our reign, before Robert Lord Gifford and his companions, then our justices of the Bench at Westminster, severally acknowledged to owe to ———, (*plaintiff*), to be made of their and each of their lands and chattels, and to the use and behoof of the said ———, be levied in a certain plea of debt upon demand for £—— (*if in case, say, "of trespass on the case to the damage of the said ———, (plaintiff) of £——," leaving out the words in italic,* against ———, late of, &c. ———, (*original defendant*) in our same court prosecuted; and whereof the said ———, (*original defendant*) was convicted, as by the record and proceedings thereof in our same court, before our said justices at Westminster aforesaid, remaining, manifestly appears; And whereupon it is considered in our same court that the said ———, (*plaintiff*) have his execution against the aforesaid ——— and ———, (*bail*) of the said several sums of £——, by them in form aforesaid acknowledged, by the default of the said ——— and ———, (*bail*) and have that money before our justices at Westminster, ——— (*return*) to be rendered to the said ———, (*plaintiff*) for the debt and damages aforesaid (*if in case, say, "damages,"*) according to the force, form, and effect of the said recognizance, whereof they are convicted, and have there this writ. Witness, Robert Lord Gifford, at Westminster, the ——— day of ———, in the ——— year of our reign.

No. 13.

Fieri facias against the bail, in debt; in case,

George the Fourth, &c. To the sheriff of ———, greeting: Whereas we lately commanded our sheriff of ———, that he should cause to be made of the goods and chattels [*copy, by way of recital, No. 13, to the end*]: And our said sheriff of ———, at a certain day now past, sent to our justices at Westminster that the aforesaid ——— and ——— had not, nor had either of them, any goods or chattels in his bailiwick, whereof he could cause to be made the said several sums of £—— and £——, or either of them, or any part thereof [*this, according to the return*]: Wherefore it is sufficiently testified in our said court, before us, that the said ——— and ——— have sufficient goods and chattels in your bailiwick, whereof the said several sums of £—— and £——, and every part thereof may be made. Therefore we command you, that of the goods and chattels of the said ———, and ———, in your bailiwick, you

No. 14.

Testatum s. fa. against bail C. P. by bill. Debt,

BAIL, *Proceeding against, on Recognizance*; FORMS, C. P.

cause to be made the several sums of £— and £—, by them in form aforesaid acknowledged, and have that money before our justices at Westminster, (*a general return*) to be rendered to the said —, for the debt and damages aforesaid, according to the force, form, and effect of the said recognizance, whereof they are convicted: And have there this writ. Witness, Robert Lord Gifford, the — day of —, in the — year of our reign.

No. 15.

Scire facias on a recognizance of bail upon a habeas corpus cum causa.

George the Fourth, by the grace of God, &c. To the sheriff of Middlesex, greeting: Whereas —, of —, and —, of —, bail of —, on the — day of —, in the year of our Lord 182—, before Robert Lord Gifford, chief justice of the Bench, at his chambers, in Serjeants' Inn, in Fleet-street, London, undertook, and each of them undertook, for themselves separately, in the sum of £—, that the said —, (*defendant*) should appear in our said court before our said justices of the Bench, at Westminster, in his proper person, or by his attorney, sufficient in the law to the action or writ of one —, (*plaintiff*) against the said —, (*defendant*) of a plea of debt upon demand, for £—, to be sued out, and prosecuted in our same court, before the end of two terms then next following, and to answer the said —, (*plaintiff*) in the plea aforesaid; and also if it should happen that judgment after the appearance of the said —, (*defendant*) made in the same court, should be given against the said —, (*defendant*) and for the said —, (*plaintiff*) then to satisfy the said —, (*plaintiff*) of the debt and damages to be recovered or adjudged against the said —, (*defendant*) in the plea aforesaid, or that the said —, (*defendant*) should render himself on that occasion to our prison of the Fleet; which said sum of £—, separately acknowledged by he said —, (*bail*) in form aforesaid, the said —, (*bail*) and each of them, separately acknowledged to be made of their, and each of their lands and chattels, and to be levied to the use and behoof of the said —, (*plaintiff*) if it should happen that the said —, (*defendant*) should make default in any of the premises, and be thereof convicted, Which said recognizance the same chief justice, afterwards, to wit, on the — day of —, in the — year of our reign, by his own proper hand, delivered into the said court to be inrolled of record, and the same is inrolled there, as by the record thereof, now remaining in our same court of record, manifestly appears: And although the said —, (*plaintiff*) before the end of two terms next after the said time of the said recognizance made in form aforesaid, to wit, on the — day of —, in the — year of our reign, sued our certain original writ of and upon the plea aforesaid out of our court of Chancery, the same court being at Westminster, in our county of Middlesex, against the said —, (*defendant*) returnable and returned in our court before our justices at Westminster, —, (*the return*) then next following, to which said original writ, sued out and prosecuted by the said —, (*plaintiff*) in form aforesaid, the said —, (*defendant*) by —, his attorney, appeared in our same court before our said justices at Westminster, according to the form of the said recognizance, and in the same plea in our said court pleaded to issue; and in such manner it was proceeded thereupon in our same court before our said justices at Westminster; that afterwards, to wit, in the term of —, in the — year of our reign, before Robert Lord Gifford and his companions, our justices of the Bench, aforesaid, the said —, (*plaintiff*) by the consideration

of the same court, recovered against the said ———, (*defendant*) as well the said debt of £——, as £——, which then were adjudged to the said ———, (*plaintiff*) in our same court, for his damages which he had then sustained by occasion of the detaining that debt, whereof the said defendant is convicted, as by the record and proceedings thereof, remaining in our said court before our said justices at Westminster, it manifestly appears: Yet the said ———, (*defendant*) hath not yet satisfied the said ———, (*plaintiff*) of the debt and damages aforesaid recovered in form aforesaid, nor hath he yet rendered his body in execution of the said judgment to our prison of the Fleet, according to the form and effect of the said recognizance, as we have been informed by the said ———, (*plaintiff*): And because we would that those things which in our said court are rightly acted, should be demanded by a due execution, WE COMMAND you, that by good and lawful men of your bailiwick, you *make known* to the said ——— and ———, (*bail*) that they be before our said justices at Westminster ———, to shew if any thing they have or know to say for themselves, to wit, the said ———, (*first-named bail*) why the said £—— by him in form aforesaid acknowledged, of his lands and chattels; and also the said ———, (*the other bail*) why the said £——, also by him in form aforesaid acknowledged of his lands and chattels, ought not to be made and levied to the use and behoof of the said ———, (*plaintiff*) according to the form of the said recognizance, if it shall seem expedient to them; and have there the names of those by whom you shall make known to them and this writ. Witness, Lord Robert Gifford, &c.

London, to wit. It was commanded to the sheriffs of London, that immediately after the receipt of this writ they should have the body of ———, (*defendant*) detained, as it was said, in the prison of the lord the king under their custody, by whatsoever name the said ———, (*defendant*) should be called in the same, together with the day and cause of the taking and detaining of the said ———, (*defendant*) before the right honourable Robert Lord Gifford, chief justice of the said lord the king of the Bench, at his chambers in Serjeants' Inn, Chancery-lane, to do and receive all and singular those things which the said chief justice should then and there consider of him in that behalf: And that they should have there that writ, &c. Afterwards, to wit, on the ——— day of ———, in the year of our lord 18——, the said ———, (*defendant*) came in his proper person, under the custody of the said sheriffs, by virtue of the said writ, and the said sheriffs, namely, ——— and ———, now return that the execution of the said writ appears in a certain schedule annexed to that writ, the tenor of which said schedule followeth in these words: We, ——— and ———, sheriffs of the city of London aforesaid, certify to the right honourable Robert Lord Gifford, chief justice of the lord the king of the Bench, &c., named in the writ annexed to this schedule, that before the coming of the said writ to us, to wit, on the ——— day of ———, in the ——— year of our lord the king, by the grace of God, of the United Kingdom of Great Britain and Ireland, king, defender of the Faith, &c., the defendant named in the said writ was taken at London aforesaid, and detained in the prison of our said lord the king, under our custody, by virtue of a certain plaint levied in the court of the lord the king, held on the day and year abovesaid, before me, the said ———, one of the said sheriffs of the said city, against the said ———, (*defendant*) by the name of ———, (*as in the return*) at the suit of ———, in a plea of debt upon demand of £——, whereupon the said parties have pleaded to an issue of

No. 16.

Entry of recognizance of bail on a *habeas corpus cum causa*.

The date of the return.

BAIL, *Proceeding against, on Recognizance; FORMS, C. P.*

the country, and so it dependeth undetermined, and this is the cause of the taking and detaining of the said ———, (*defendant*) whose body we have ready: Afterwards, to wit, on the said ——— day of ———, in the year of our lord 18— aforesaid, before the right honourable Robert Lord Gifford, chief justice of the court here, at his chambers, situate in Serjeants' Inn, Chancery-lane, came ———, of ———, and ———, of ———, (*the bail*) and undertook, and each of them undertook, for themselves and himself separately, in the sum of £——, that the said ———, (*defendant*) should appear here in his proper person, or by his attorney, sufficient in the law to the action or writ of the said ———, (*plaintiff*) of and upon the cause aforesaid before the end of two terms then next following, to be sued out and prosecuted in the same term here, and to answer to the said ———, (*plaintiff*) in the plea aforesaid; and also if it should happen that judgment, after the appearance of the said ———, (*defendant*) made in the court here, should be given for the said ———, (*plaintiff*) to satisfy the said ———, (*plaintiff*) of the debt to be recovered or adjudged against the said ———, (*defendant*) in the plea aforesaid, or that the said ———, (*defendant*) should render himself on that occasion to the prison of the said lord the king, of the Fleet, which said sum of £——, separately acknowledged by the said ——— and ———, (*the bail*) in form aforesaid, the said ——— and ———, and each of them, separately acknowledged to be made of their lands and chattels, and to be levied to the use and behoof of the ———, (*plaintiff*) in form aforesaid, if it should happen that the said ———, (*defendant*) should make default in the premises, and be thereof convicted, which said recognizance the said chief justice afterwards, to wit, on the ——— day of ———, in this same term, by his own proper hand, delivered here into court, to be inrolled of record, &c.

No. 17.

Form of declaration on recognizance of bail for an assault. C. P.

——— term, in the ——— year, &c. Middlesex, to wit. ———, late of ———, was summoned to answer unto ———, in a plea that he render to the said ———, £—— of lawful money of Great Britain, which the said ——— owes to and unjustly detains from the said ———: And thereupon the said ———, by ———, his attorney, complains, That whereas the said ———, heretofore, to wit, in ——— term, in the ——— year of the reign of the lord the now king, in his own proper person came into his majesty's court before the right honourable Robert Lord Gifford and his companions, then his said majesty's justices of the Bench here, to wit, at Westminster, in the county of Middlesex, and then and there in the said court here, acknowledged himself to owe to the said ———, the said sum of £—— above demanded, which said sum of £——, the said ———, for himself and his heirs, did consent and grant to be made of his lands and chattels, and to be levied to the use and behoof of the said ———, upon condition, that if judgment should happen in the said court here to be given for the said ———, against one ———, (*original defendant*) in a certain plea of trespass and assault to the damage of the said ——— of £——, by the said ———, against the said ———, in the said court, brought, then that the said ——— should satisfy to the said ——— all the damages which should be adjudged to the said ——— against the said ———, in the same court here in the plea aforesaid, or should render his body upon that occasion, to the prison of the Fleet, as by the record of the said recognizance

remaining in the said court here at Westminster aforesaid, may more fully appear: And whereas afterwards, to wit, in that same ———— term, in the ———— year of the reign aforesaid, judgment was given in the said court, before the said Robert Lord Gifford, and his companions, then his said majesty's justices of the Bench here, to wit, at Westminster aforesaid, for the said ————, against the said ————, (*original defendant*) in the plea aforesaid, and the said ———— then and there, by the consideration and judgment of the same court, recovered in the said plea against the said ———— £——, which in and by the said court were adjudged to the said ————, for his damages which he had sustained, as well by reason of the said trespass and assault, as for his costs and charges by him about his suit in that behalf expended, whereof the said ———— was convicted, as by the record and proceedings thereof, in the said court of the Bench here, at Westminster aforesaid, still remaining, more fully appears: And the said ———— in fact saith, that the said ———— hath not yet satisfied the said ———— the £—— damages aforesaid by the said ————, so recovered against the said ————, as aforesaid, or any part thereof, or rendered his body on that occasion to the Fleet, according to the form and effect of the condition of the said recognizance, and that the said ———— hath not yet obtained execution of the said judgment against the said ————, nor hath he yet obtained any execution against the said ————, upon the said recognizance: And the said ———— further saith that the said judgment, so obtained against the said ————, still remains in full force, strength, and effect, not in the least reversed, vacated, or satisfied: and that the said recognizance, so acknowledged in form aforesaid, remains in full force, strength, and effect, not vacated or satisfied, whereby an action hath accrued to the said ————, to demand and have of and from the said ———— the said sum of £——, in form aforesaid acknowledged and above demanded, Yet the said ————, although often requested so to do, hath not as yet paid the said sum of £—— above demanded, or any part thereof, to the said ————, but he to do this hath hitherto wholly refused, and still doth refuse: Wherefore the said ———— saith that he is injured, and hath sustained damage to the value of £——, and therefore he brings suit, &c.

This averment
may be omitted.

BAIL, *in Error.* The law and practice will be found under title ERROR, which see.

BAIL. *Their power of over the principal.*

It may seem reasonable that the law should provide that those who become bail, should be protected from consequences to which they may be exposed from the wilful absence of the principal; and therefore bail may take him even on a Sunday. Anon. 6 Mod. 231. In this case the court is reported to have said, "The bail have their principal always upon a string, and may pull the string whenever they please, and render him in their own discharge." In *Sheers v. Brooks*, 2 H. Bl. 120. Lord Loughborough, C. J. is reported to have said, that the bail have a right to go into the house of the principal as much as he has himself; they have a right to be constantly with him, and to enter when they please to take him. These cases seem to be decided on principle, but it has certainly been ruled, *Brookes v. Warren*, 2 Bl. R. 1273. that such taking on a Sunday was illegal and the defendant was discharged; but, on reference

Observation.

When and where
bail may take
and secure prin-
cipal.

BAIL; Their Power over Principal; Surrender in Discharge of.

to that case, it should seem to have been decided rather upon its own peculiarly grievous and oppressive facts; the defendant being, as the report states her, "an unfortunate woman of the town, to circumvent whom a variety of tricks and sharp practice had been adopted," though the cases of *Reyner v. Sharp*, *Cooke*, 33. and *Featherstonhaugh v. Atkinson*, *Bar.* 373. were cited by the court.

So it seems undoubted that the bail may seize their principal while under examination before commissioners of bankrupt. *Co. B. L.* 113. or going to a court of justice. 1 *Sel.* 170.

It does not appear that bail may break an outer door for the purpose of seizing a defendant, though they may inner doors. *Sheers v. Brooks*, 2 *H. Bl.* 120.

And a person may assist bail in taking, and may lawfully detain the principal, although the bail do not continue present. *Pyewell v. Stow*, 3 *Taunt.* 425.

But if the defendant consent to go to a lock-up house, the bail should be careful to obtain such consent to that measure in writing.

And after proper render it seems bail are no longer cognizable in that character by the court, for although a bail having rendered the defendant, instigates him to vexatious attempts to obtain his discharge under an insolvent act, the court will not compel him to pay the costs of the plaintiff's resisting those attempts. *Winstanly v. Head*, 4 *Taunt.* 192.

Where principal
impressed, or a
felon,

It may be useful to say here that impressed men in custody at the Savoy, *Bond v. Isaac*, 1 *Burr.* 339. a felon in custody of a sheriff on a charge of murder, *Sharp v. Sheriff*, 7 *T. R.* 226, may be taken by *habeas corpus*, duly issued and directed, and surrendered in discharge of bail. Where the defendant is a felon, it is said such *habeas corpus* must issue on the crown side.

But C. P. will not interfere to take a party out of the criminal custody of the Court of K. B. in order to surrender him in discharge of bail, *Currie v. Kinnear*, 1 *T. & B.* 23. *S. C.* 1 *J. B. Moore*, 259.

Cases may occur however, where the bringing up a felon defendant, might be attended with great public inconvenience, as where he might be sentenced to, *Wood v. Mitchell*, 6 *T. R.* 247, or where he might be embarked for, transportation. *Fowler v. Dunn*, *Burr.* 2034. In the former case the court permitted an *exoneretur* of the bail to be entered, on account of the impossibility of taking the defendant. In the latter they refused the *habeas corpus*, but it is presumed an *exoneretur* would have been permitted to be entered.

BAIL. Surrender in Discharge of Bail.

As to a prisoner in custody upon render, but before execution, being stillailable, see page 188, *ante*.

Ground and prin-
ciple of surren-
der in discharge
of bail.

The elucidation of the law and practice of surrender in discharge of bail will be somewhat facilitated by attending to the end sought to be obtained by the arrest itself, which is that of ensuring the due appearance of the debtor to answer the suit or action instituted by the creditor. If by the intervention of other persons on behalf of the defendant, and in the character of bail for his due

appearance, the attainment of this end be impeded or not effected, with relation to the person of the debtor, the plaintiff may call upon such bail to fulfil the obligation they have assumed; namely, to satisfy the plaintiff or creditor in case the defendant shall himself fail to make such satisfaction either by the due render of his person, or by payment of the debt or damages claimed by the plaintiff to be due to him.

If the plaintiff be not impeded or defeated in such object of the arrest, the courts have equitably provided that the bail be allowed, according to certain forms, to give up into his legal power the person for whom they shall have become bail.

The whole doctrine of surrender in discharge of bail, various and complex as, when traced through the numerous cases, it appears to be, easily resolves itself into this proposition, namely, that if by a due surrender of the defendant to custody pending the suit, a plaintiff shall be placed in a situation no worse than that in which the prosecution of his legal remedy in course would have placed him, the bail will, by such surrender, be discharged.

The cases to be adduced will be found to illustrate and corroborate this position, and it is presumed, that if the question on this proposition be answered in the negative, the surrender of the defendant will not discharge the bail. Not even an insolvent act, which discharges the principal, will, it appears, discharge his bail; for where the defendant in an action gave a *cognovit* for the debt and costs, payable by seven instalments, and after the bail were fixed, an act of insolvency passed, discharging debtors in custody for debts due on a certain day prior to the bail being fixed, at which day three only of the instalments were payable, and afterwards the principal was discharged under the act, when only two more of the instalments had become payable, yet held that the bail were liable for the whole condemnation money, the entire debt, *quâ* debt being due *instantly*, with a stay of execution only for certain portions at certain times. *Shakespeare v. Phillips*, 8 *East*, 439. But it must be presumed, that in this case the bail had notice of the time given the defendant. For although a *cognovit*, generally, by the defendant, does not discharge the bail, *Hodgson v. Nugent*, 5 *T. R.* 277. yet where time is given the principal without their knowledge they are discharged. *Thomas v. Young and Joggett*, bail of Graham, 15 *East*, 617. And see title *COGNOVIT*, *post*.

And the privilege of surrender extends even to rejected bail. *The King v. Sheriff of Middlesex*, 1 *Chit. R.* 446. *Per Cur. E.* 40 *G. III.* K. B. 1 *Tidd*, 300. But where time was given to the plaintiff to see whether bail were really possessed of the property in respect of which they professed their ability to justify, and on the day appointed for coming up again, the bail being rejected, immediately rendered the defendant: Held that the sheriff was liable to an attachment, the notice of render not having been served until after the attachment had issued. *The King v. The Sheriff of Middlesex*, 2 *D. & R.* 225.

It has been seen that surrender of the defendant before the return of the writ is a good ground for vacating the bail bond. *Jones v. Lander*, 6 *T. R.* 753. *Stamper v. Millbourne*, 7 *T. R.*

Rejected bail may surrender.

Of surrender before judgment against principal.

Whether surrender may be made before return of the writ.

122. but due notice must be given. *Maddocks v. Bullcock*, 1 B. & P. 325. and it is also optional with the sheriff whether he will accept such surrender in discharge of the bail bond before the return of the writ. *Hamilton v. Wilson*, 1 East, 383. And see *Forster v. Hyde*, M. 41 G. III. K. B. 1 *Tidd*, 300. But see *Callaway v. Seymour*, E. 42 G. III. K. B. *Id.* 248. *Harding v. Hennen*, 3 B. & P. 232.

Bail above may be put in, and the defendant be surrendered before the return of the writ. *Hyde v. Whiskard*, 8 T. R. 456. The practitioner would do well however to refer to the reports of cases cited at the foot of the above case from the MS. notes of Lord Chief Justice Willes, C. P.; that court differed in delivering the judgment, and the Lord Chief Justice states his reason at length.

What proceeding advisable in C. P.

In C. P. therefore, it might seem advisable not to put in bail, and surrender before the return of the writ, unless there be some very cogent reasons for doing so; but see *Wardle, one, &c. v. Bowland*, M. 24 G. III. C. P. 1 *Tidd*, 306. And it is not necessary in either court for the bail to justify, in order to render even after they are excepted to, or though the sheriff has been ruled to bring in the body. *Ashton v. King and Another*, M. 21 G. III. K. B. *Id.*

Abstract of rule as to render.

If action be brought against bail upon their recognizance, they shall have eight days in full term after the return of the process to surrender the defendant. *R. G. T. 1 Ann.*

Time to render after action brought, C. P.

The bail have eight days in full term in which to surrender the principal, if an action be brought against them in K. B. upon their recognizance in C. P. as if the same had been taken in K. B. *Fisher v. Branscombe*, 7 T. R. 355. See also *Byrne v. Aguilar*, 3 East, 306.

K. B.

So in K. B. the bail have eight days in which to render the principal on the return of that writ on which there is an effectual proceeding against them. *Wilkinson v. Vass*, 8 T. R. 422.

And an intervening Sunday is to be reckoned as one of the eight days in full term given to bail to render their principal after the return of the writ. *Creswell v. Green*, 14 East, 537.

A defendant may be rendered [at any time] during the whole of the day on which the rule to bring in the body expires. *The King v. London, (Sheriffs)* 1 Price, 838.

The Court of Exchequer will set aside an attachment against the sheriff on payment of costs if the defendant has been rendered on the evening of the last day of the rule, and notice be given early next morning. *Ib.*

Where plaintiff died.

Therefore where the plaintiff sued the bail on their recognizance who did not render the principal within eight days, and then plaintiff died after plea and demurrer in that action, and his executors brought another action against the bail; it was ruled that the bail had eight days from the return of the process in the second action in which to render the principal. *Wilkinson v. Vass*, 8 T. R. 422.

Where bail died.

So in C. P. where bail, served with process on his recognizance, died before the *quarto die post*, and fresh process issued against his executors, it was held that they had until the *quarto die post*

of the second writ to surrender the principal. *Meddowcroft v. Sutton*, 1 B. & P. 61.

Bail sued on their recognizance by attachment of privilege may render the principal on the appearance day of the return. *Fletcher v. Aingell*, 2 H. Bl. 117. but the render must be made before the rising of the court. *Lardner v. Bassage*, *Id.* 593.

When bail may render on being sued by attachment of privilege.

But it may be recollected as above, *Fisher v. Branscombe*, 7 T. R. 355, that if bail be sued on the recognizance in K. B. they have eight days after the return of the writ to surrender the principal, and that if there be but four days remaining of the term, then they have four days of the following term.

Where only four days of term remaining, what time bail have to render.

In both courts where the proceeding against the bail is by *scire facias*, and by original, they have till the *quarto die post* of the return of the first *scire facias*, if *scire feci* be returned, or, if *nihil* be returned, till the *quarto die post* of the return of the second *scire facias* to render the principal; where the proceedings are by bill in B. R. the time for rendering is the return day of the *scire facias*, and in all these cases the surrender must be made *sedente curia*. Note to *Fletcher v. Aingell*, 2 H. Bl. 118. but this seems to be matter of indulgence rather than of right. *R. T. 1 Ann. R. 2. (a.) K. B.*

Of time to render where proceeding is by original.

The bail having once been prepared to render their principal in time, which they then omitted to do, in consequence of a rule *nisi* taken out by them on the suggestion of the court, with a view to an arrangement out of court between the parties, (the principal being a lunatic) which rule was afterwards discharged without providing for the bail to be placed in the same situation that they were in before the court in a subsequent term permitted the bail to take an objection, mentioned *ante*. See title BAIL, *Proceedings on Recognizance*, to the regularity of the proceeding, though they had before in the same term, although then unaware of that objection, brought forward another objection, which was over-ruled. *Cock v. Brockhurst*, 13 East, 588.

Where a writ of error is allowed before the expiration of the time permitted to the bail to render their principal, the bail are entitled to stay the proceedings against them, pending the writ of error on the terms of undertaking to pay the damages recovered, or to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff. *Spreng v. Monprivatt*, 11 East, 316. A note to this case also refers to 1 *Tidd*, 145. where the permission to surrender *after* the return of the processes therein and above mentioned, is considered as matter of favour and indulgence.

Of staying proceedings where error brought.

The bail *above*, or the bail to the sheriff on the bond, may surrender a defendant by putting in bail *above* after the return of the writ, though the defendant himself object thereto. *Berchere v. Colson*, *Str.* 876. It is said, *ubi supra*, that the bail *below* may so put in bail; it is also said, page 198, that the sheriff may take only one surety; it is also said, that in order to warrant a surrender, it must be complete bail, namely, two persons. 1 *Sel.* 168. The authorities cited do not appear on reference; *Quare*, therefore, could the bail *below*, if one only offer himself, be received as bail *above* for the purpose of surrender? It should seem that one of these broad assertions must be erroneous.

Who may put in bail and surrender.

Observation as to bail *below* surrendering.

Quare, Whether bail *below*, if only one, can surrender?

Where to surrender bail need or not justify.

Bail out of court cannot surrender.

Where original bail may surrender.

K. B.

Where not.
C. P.

Where after assignment of bail bond, they may surrender.

Where sheriff may put in bail and surrender.

Where court enlarged the time for surrender.

Observation.

Where not.

Though bail put in for the purpose of surrender need not justify; and if one justify, and the other be rejected, they may surrender the defendant. *Anon. K. B. E. 40 G. III. 1 New. R. 138. n.* but not, it should be observed, if the time be expired.

The bail excepted to, and failing to justify in time, are out of court, and cannot surrender the defendant. *Hardwicke v. Black, 7 T. R. 297.*

It should also seem, that notwithstanding added bail may be rejected, yet if the original bail, though excepted to, be not struck out of the bail-piece, they may surrender the defendant. *The King v. The Sheriff of Essex, 5 T. R. 633.* And though rejected, yet if still on the bail-piece, they may surrender the defendant. *Anon. ubi supra.*

But in C. P. bail rejected are no bail, and cannot surrender. *Miles v. Head, 1 New. R. 137.* But where the bail failed to justify on the day mentioned, they were allowed to render their principal. *Scaver v. Spraggon, 2 New. R. 85.*

Even after the assignment of the bail bond, bail may be put in, and without justification they may surrender the defendant. Proceedings on the bail bond will be stayed on motion. *Edwin v. Allen, 5 T. R. 401.* *Meysey v. Cornell, Ib. 534.* *Hale v. Walker, 1 H. Bl. 638.*

So, though sheriff ruled to bring in the body, bail may be put in, and they may render without justification, any time before the expiration of the rule, due notice thereof being given, and affidavit made. *R. G. T. S3 G. III. 5 T. R. 368;* but bail surreptitiously put in, cannot surrender. *Jackson v. Morriss, 2 Bl. R. 1179.*

The court enlarged the time of render, in order that the examination of the principal might be previously completed, no prejudice ensuing therefrom to the plaintiff. *Maude v. Jowett, 3 East, 145.* *Glendinning v. Robinson, 1 Taunt. 320.* In this case the costs of the application were to be paid by the bail, and to prevent delay, the plaintiff was to be at liberty to issue a *scire facias* against the bail, not to be proceeded on, however, unless the defendant should not be surrendered at the time appointed.

The practitioner will readily perceive that this settled practice in both courts is in direct agreement with the proposition advanced, *ante*, page 241; for by surrender at these periods, the plaintiff is in no worse situation than he would have been in provided the defendant had been at large on bail.

But the court will not enlarge the time for bail to render their principal, on the ground of endangering his life by removal. *Wynn v. Petty, 4 East, 102,* and the case of *Nightingale v. Lowry*, there cited, n.; and time for surrender was refused to be enlarged on an affidavit, stating that the principal was a lunatic, it not appearing that he was in such a state as to occasion any immediate peril of life, either to himself, or those about him. *Cock v. Bell, 15 East, 355.* In this case it appeared that if it had been so sworn, or that the life of others would also have been endangered, the court would have enlarged the time for surrender; or if it had been sworn, that by continuing the present custody, there was a probability that he would recover; neither is unwarrantable arrest or detention in a

foreign country, or impossibility, save by act of law of our own state, a ground for granting time for surrendering a principal. *Grant v. Fagan*, 4 *East*, 189.

It may not be improper to mention a case or two, in illustration of what is included under this exception, conveyed in the phrase "Act or law of our own state."

In case of the defendant being an alien, and sent out of the kingdom under the Alien Act, 33 G. III. c. 4. *Merrick v. Vaucher*, 6 *T. R.* 50. *Coles v. De Hayne*, *Id.* 52, or being transported, *Wood v. Mitchell*, *Id.* 247, or becoming a peer, *Trinder v. Shirley*, *Doug.* 45, or member of parliament, *Langridge v. Flood*, cited from 1 *Tidd*, 152, in the above case of *Grant v. Fagan*. But where A. is held to bail in a civil action, after which an extent issues against him at the suit of the crown, and he is thereupon committed to the custody of the sheriff of London; on an application to the court by the bail for relief, held, first, that the bail were not entitled to enter an *exoneretur* on the bail piece; secondly, the crown having refused its consent to the defendant being surrendered, unless he should be immediately remanded to the custody of the marshal; that this court would have no authority so to remand him, after he had been surrendered to the warden of the Fleet; thirdly, that the bail could not surrender the defendant by *habeas corpus*, as a matter of right, without the consent of the crown. But the court expressed their readiness to give the bail time for surrendering the defendant. *Hodgson v. Temple*, 1 *Marsh.* 166. 5 *Taunt.* 503. S. C.

A prisoner for felony may be brought up at the instance of his bail in an action by *habeas corpus*, directed to the sheriff, in whose custody he is, to be surrendered. *Sharp v. Sheriff*, 7 *T. R.* 226; but it is said that the bail must first justify in this case. See also *Daniel v. Thompson*, 15 *East*, 78. And in this case the *habeas corpus* issues on the Crown side. But the court of C. P. will not grant a *habeas corpus* to bring up a prisoner in custody upon a criminal matter, in order to have him charged with a declaration in a civil action. *Walsh v. Davies*, 2 *N. R.* 245, and this case, by implication, applies to *habeas corpus* for the purpose of surrender in discharge of bail. Note, however, that the C. P. in this case will, at the instance of the bail, and on an affidavit of the facts, grant a rule for enlarging the time for the surrender of the defendant in their discharge, and the time is generally extended, so as to take in the period at which it is probable the defendant will be tried: if acquitted, the bail will be at liberty to surrender him; if convicted, the court will direct an *exoneretur* to be entered. A rule for thus enlarging the time, &c. granted in ——— *v. Remington*, *Michaelmas Term*, 53 G. III. 1812. M. S.

As to who may be surrendered, though in custody on other matters.

A lunatic also may be brought up by *habeas corpus* from St. Luke's hospital for the purpose of surrender. 3 *B. & P.* 550.

So in Taylor's case also, who was committed to Newgate, a *habeas corpus* was granted for the like purpose; he was committed to the custody of the marshal *pro formâ*, and afterwards re-committed to Newgate. In such a case, the *habeas corpus*, and the rule

Of surrender of principal after judgment against him.

for his surrender, issued on the crown side of the court. 3 *East*, 232.

The general doctrine of surrender, and as to the power of bail over the person of their principal, has been treated as referring to an earlier stage of the cause, namely, before the original suit shall have been prosecuted to judgment. The practical cases and decisions as to bail being fixed, *after judgment* shall have been obtained against the principal, now follow. But though it be said that the bail are fixed immediately on the return of the *ca. sa.* or writ of execution against the principal, yet following up the principle adverted to and deduced above, the courts have *ex gratia curia*, it is said, not *ex debito justitiæ*, permitted the bail to discharge themselves by a surrender of their principal, even after that time; but to this tenderness of the courts, to this kindly, humane, and liberal principle of the practical administration of justice of this country, there must, it is obvious, be some limit, lest the very end and object of bail itself should be defeated; and it will be in place therefore to adduce the cases and decisions in which this especial favour of the courts has been granted or denied.

Before the return of the *capias ad satisfaciendum*, the render is a matter of right, and may be pleaded. *Clerk v. Wilmore*, 1 *Ld. Raym.* 156, 7. But afterwards it is allowed by the grace and favour of the courts. *R. T. 1 Ann. reg. II. (a).* K. B. And not *ex debito justitiæ*, for the condition of the recognizance is broken upon the return of *non est inventus* to the *capias*, and therefore a subsequent render cannot be pleaded. *Healey v. Medley*, *M.* 24 G. III. K. B. 1 *Tidd*, 310. *Whitehead v. Gale*, *Bar.* 106, 7.

The *ca. sa.* being in the office, and returnable, though not returned, *Boylard v. Crooke and Others*, bail of Porter, cited 2 *Sel.* 55, or if returned, though not filed, and the death of the principal after such events having prevented his surrender, the bail become inevitably fixed. *Rawlinson v. Gunston*, 6 *T. R.* 284. And see *Field v. Lodge*, *E.* 24 G. III. K. B. 2 *Tidd*, 1129.

As to the time of surrender, K. B.

In case of action on the recognizance, the bail in K. B. by *R. G. 1 Ann.* have eight entire days in full term to surrender their principal, and this also if the recognizance upon which such action shall have been brought in K. B. shall have been taken in C. P. *Fisher v. Branscombe*, 7 *T. R.* 355.

As to this point in C. P.

But in C. P. the principal must be surrendered before or on the appearance day of the return of the writ *sedente curia*. *Derisley, one, &c. v. Deland*, *Bar.* 82.

In both courts where the bail are sued by *sci. fa.* and the proceedings are by original, they have till the *quarto die post* of the return of the first *scire facias*, if *scire feci* be returned, or, if *nihil* be returned, till the *quarto die post* of the return of the second *scire facias* to render the principal. Where the proceedings are by bill in B. R. the time for rendering is the return day of the *scire facias*, and on the appearance day in C. P. and in all these cases, it is absolutely necessary that the render be made *sedente curia*. *Fletcher, one, &c. v. Aingell*, 2 *H. Bl.* 118. n. *Lardner v. Basage*, *Ib.* 593, and that the render must be made *sedente curia*, is

now the settled practice, which must be also stated in the affidavit made on application for relief by the bail. *Hansley v. Page*, Bar. 75.

So where an action was brought against a bail on his recognizance, and he dying before the *quarto die post*, an action was commenced against his executors, who were allowed until the *quarto die post* of the second writ to surrender the principal. *Meddowcroft v. Sutton*, 1 B. & P. 61.

And the bail are entitled to be discharged upon their bankrupt principal's obtaining his certificate, before the time allowed to them by the indulgence of the court for rendering their principal is out, that is, before the appearance-day of the last *scire facias*. But the bail not having applied in time to enter an *exoneretur* on the bail piece till after the money levied upon them, can only be relieved on payment of costs. *Mannin v. Partridge and Another*, bail of Godshall, 14 East, 599.

Where the principal brings a writ of error upon the original judgment, if brought in time, the proceedings against the bail, if any have been commenced, are also suspended; and such cases and decisions as have occurred as to proceedings against bail after error brought will be now abstracted.

Where error brought on the original judgment.

As to the writ of error operating as a general *supersedeas*, see title ERROR, post.

It may be well to premise, that wherever it may be clear that error is sued for the purpose of delay, the court will not stay proceedings against the principal or the bail. *Entwistle v. Shepherd*, 2 T. R. 78. From such the confession of the party, or of the bail, or of the attorney, it will be clear that error is brought for delay. *Pool v. Charnock*, 3 T. R. 79. *Mitchell v. Wheeler*, 2 H. Bl. 30, and words tantamount to acknowledgment or confession would be sufficient to prevent the interference of the court. *Law v. Smith*, 4 T. R. 436. n. *Miller v. Cousins*, 2 B. & P. 329. *Masterman v. Grant*, 5 T. R. 714; but see *Rawlins v. Perry*, 1 N. R. 307, where it was ruled that the words *must* imply the purpose of delay.

Caution as to error brought for delay.

A writ of error allowed before *ca. sa.* issued, operates *entirely* as a *supersedeas* of all proceedings against the bail. *Dudley v. Stokes*, 2 Bl. R. 1182, or if it be allowed and served before the return of *ca. sa.* although the *ca. sa.* may have lain four days in the office before the allowance of the writ of error. *Perry v. Campbell*, 3 T. R. 390.

In what case error is an entire *supersedeas*.

So, it has been determined that where *ca. sa.* is returnable pending error, there was no regular foundation for proceeding against the bail. *Derisley v. Deland*, Bar. 83. See also *Miller v. Newbald*, 1 East, 662. *Sampson v. Brown*, 2 East, 439.

And upon the like principle it appears, that where the writ of error is allowed after the return of the *ca. sa.* and before the time expired, when bail might otherwise have rendered, and although the plaintiff's attorney shall not have had notice of such allowance till after the expiration of such time for render, the bail will be entitled to a stay of proceedings against them until the writ of error shall be determined, on their undertaking to pay the plaintiff the

Where error allowed after return of *ca. sa.*

damages recovered by the said judgment, or duly surrender the defendant into proper custody within four days next after the determination (this means final determination, see below), of the writ of error, in case the same shall be determined in favour of the defendant in error. *Capron v. Archer*, 1 *Burr.* 340, and at the foot of the report of this case, the reader is referred to *Myer v. Arthur*, 1 *Str.* 419. *Richardson v. Jelly*, 2 *Str.* 1270; and also to other cases wherein this point occurred; but these cases cited embrace, it is said, the leading principle of the point, and remain, I believe, unshaken by any subsequent authority.

From what time error a *supersedeas* in C. P.

What meant by affirmance.

It will be material to note, that in C. P. the writ of error is no *supersedeas* until it be delivered to the clerk of the errors. *Sykes v. Dawson*, *Bar.* 209.

It is observed above that the writ of error operates as a *supersedeas* of proceeding against bail until affirmance, this means final affirmance; for where judgment was affirmed in the Exchequer Chamber, the same plaintiff in error brought error in the House of Lords, but the defendant in error proceeded against the bail, on their undertaking to pay or surrender on the affirmance of the judgment; the court however relieved the bail, and determined that the spirit of their undertaking was, that they should not be held liable on their undertaking until the final affirmance. *Kershaw v. Cartwright*, 5 *Burr.* 2819.

Where error is brought after bail fixed.

Where writ of error is not brought till it is too late for the render to be made (without an appeal to the usual indulgence of the court), proceedings against the bail will not be stayed. *Everitt v. Gery*, 1 *Str.* 443, and *Church and Throgmorton, Dom. Proc.* was cited in this case, where the House threatened to commit the attorney for proceeding against the bail pending error in Parliament.

Terms imposed on bail who are fixed.

But where the application for relief on the part of the bail, pending error, was after their time for surrender had expired, the court in a subsequent case would only allow them four days to pay the money in after the judgment in error was affirmed. *Richardson v. Jelly*, 2 *Str.* 1270; and if there be none in error, the bail, as they ask a favour, so they must submit to equitable terms, and undertake to pay the costs on the writ of error if the judgment be affirmed. *Riston v. Francis*, 2 *Str.* 877. And in a subsequent case, where bail were fixed previously to a writ of error sued out, the court stayed proceedings, on their undertaking to pay the condemnation money, the costs on the *sci fa.* and if there was no bail in error, the costs of the writ of error, if judgment should be affirmed. *Buchanan v. Aldus*, 3 *East*, 546. See also *Copous v. Blyton*, 1 *N. R.* 67.

Bail in error must be put in.

It will be also material to recollect, that if bail in error be required, and it be not duly put in, proceedings against the original bail will not be stayed, notwithstanding error be pending. *Hunter v. Sampson*, 2 *Str.* 781.

Pending error, no proceeding against bail.

Pending error, the plaintiff will be equally prevented from proceeding against the bail by action on the recognizance; nor will the bail be required to give judgment. *Newman v. Butterworth*, *Bar.* 66. *Clarke v. Baker*, *Id.* 68. Both these cases seem to

decide this point most unequivocally, since the reason for the decision is assigned; namely, that by giving judgment the bail would be precluded from surrendering the defendant; but in the subsequent case of *Gostelow v. Wright*, *Bar.* 86, the court exacted of the bail the giving judgment as a ground of staying proceedings in an action against them.

Notwithstanding a prior case of *Fisher v. Emerton*, 1 *Str.* 586, the court of K. B. did not seem to think the judgment against the bail a sufficient reason for denying them the privilege of surrender, on the determination of error; for, in *Taswell v. Stone*, that court stayed proceedings on, but would not set aside, a judgment obtained against bail by default, pending error, saying that it was highly proper to stay proceedings upon it, as it would be unreasonable that the plaintiff should proceed in executing a judgment, which would of course fall to the ground, in case the original judgment upon which it was founded should be reversed. 4 *Burr.* 2454. In this case the sheriff had levied on the goods of the bail. See also *Benwell v. Black*, 3 *T. R.* 643, where it was contended that the writ of error did not operate as a *supersedeas* of the judgment in the action against the bail; but the court decided that it did.

The court of C. P. had before determined otherwise; namely, where bail had suffered judgment by laches in not applying, they had refused to stay proceedings pending error. *Humphreys v. Daniel*, *Bar.* 202. *Clarkson v. Physick*, *Id.* 203.

Bail in the original action are not liable for the costs in error, where no bail had been taken. *Yates v. Doughan*, 6 *T. R.* 288. but the reason assigned *arguendo* this case, seems to be too extensively stated, viz. that when a defendant brings a writ of error, he puts in other bail, to whom the plaintiff may resort for the costs of the writ of error; and if that were the reason or principle upon which the court decided, as the report would seem to imply, it will follow that the bail would have been liable, if there had been no bail in error, which decision upon such a principle the older cases cited in the argument by no means warrant, for by them it appears to be explicitly determined that the bail in the original action, whether there be bail in error or not, are not liable to the costs in error. See 1 *Roll. Abr.* 335. "Baile," *pl.* 15. *Penruddock v. Errington*, *Cro. Eliz.* 587. *Smith v. Faldo*, *Cro. Jac.* 636.

Where bail in original action not liable to costs in error.

If *A.* being arrested by *B.* on process of C. P. give bail to the sheriff, and before the return of the writ, being arrested by *C.* is committed to the Fleet prison; after which *B.* takes an assignment of the bail bond, and proceeds thereon, the court will stay such proceedings, but will not make *B.* pay costs, for they will not try upon affidavit, whether he knew or not that *A.* was in custody, but will consider him ignorant of that fact, unless notice of surrender has been regularly given. *Harding v. Heunam*, 3 *B. & P.* 232.

As to costs to be paid by bail on surrender.

After due notice of render of the principal, all further proceedings against the bail shall cease, *R. G. T. 1 Ann.* *Byrne v. Aguilar*, 3 *East*, 306; and it was held in this case that the non-

BAIL, Surrender, Costs on; CASES; PR. DI. K. B.

payment of costs of proceedings against them, did not supersede the express direction of the rule. And see *Dawson v. Shuter*, T. 26 G. III. K. B. *Bartrum and others v. Howell*, T. 31 G. III. K. B. 1 *Tidd*, 559. *Smith v. Lewes*, 16 *East*, 168, 9. *Creswell v. Hern*, 1 *M. & S.* 742.

But if, upon a return of *non est inventus* to the *ca. sa.* the plaintiff proceed against the bail, and deliver a declaration conditionally, the costs thereon, as well as the costs of the original action, must be paid, although the bail tendered the original damages and costs before the end of eight days from the return of the *ca. sa.* within which time, by the practice of the court, they might have discharged themselves by surrendering their principal. *Perigal v. Mellish*, 5 *T. R.* 363. The like in C. P. though the surrender take place within the four days after the return of the *ca. sa.* allowed by the practice of this court. *Abbott v. Rawley*, 3 *B. & P.* 13. *Acc. Hughes v. Poidevin*, 15 *East*, 254. But in this case the proceeding against the bail was *by action*, on the recognizance. But see *Smith v. Lewes*, 16 *East*, 148; and the court referred to the rule, T. 1 *Ann.* consequently the authority of the cases, where the render had been made in time, and notice given, and yet that costs were ruled to be paid on motion to stay proceedings seems to be doubtful.

The distinction to be borne in mind in these cases seems to be, that in some of them the bail not having rendered, applied within the time they might have rendered after the return of the *ca. sa.* to pay the original debt and costs, without the costs of the action on the recognizance.

But where the render takes place within the time limited after the return of the *ca. sa.* it seems, from the last determinations, that the bail are not liable to the costs of the action. See also *Dawson v. Shuter*, 1 *Tidd*, 559; *Bartrum v. Howell*, *Id.*

PRACTICAL DIRECTIONS, K. B.

The principal, either voluntarily or by constraint, being in the custody of the bail, is to be taken to a judge's chambers, whose clerk makes out a committitur and surrender, see tit. COMMITTITUR, post, agreeably to R. G. E. 8 G. III.

It is usual to write under the commitment, the stage of the cause at which the surrender was made; namely, if before declaration, add the sum sworn to on arrest; if after declaration, in addition to the sum sworn to, add "declaration filed," or "delivered," as the case may be, or "issue joined," or "interlocutory judgment signed," whether after final judgment, if in debt, the debt and damages, and if in other cases, add the quantum of damages.

The defendant is then delivered to the custody of the tipstaff, who conveys him to the King's Bench prison; pay clerk 9s. 6d.; tipstaff 6s.

*Give notice, FORM, No. 1, agreeably to the late case, In the matter of Salisbury, 5 B. & A. 266, immediately, since the surrender is only good from the time of notice. The King v. London, (Sheriffs) 1 Price, 336. But if given before the rising of the court on the day of render, it is time enough. Per Cur. H. 26 G. III. K. B. 1 *Tidd*, 312. *Wiggins v. Stephens*, 5 *East*, 533. And see 2 *Smith*, 242.*

Make affidavit of due service of such notice; take same to the judge's clerk or filazer, K. B. in whose possession the bail piece remains, who delivers the bail piece in return for the affidavit of the service of the notice of render.

Then apply to the marshal of the King's Bench prison for his certificate that the defendant is in his custody; pay for the same 3s. 6d.; the tipstaff generally brings this with him from the prison, so that application may be made to him.

The master then, on application for that purpose, and producing the bail piece and certificate, which last he keeps and files, enters an *exoneretur* on the bail piece; pay 2s. 4d.; the bail piece is to be filed with the signer of the writs; see Table of Offices, pay 4d.

The next and last step is to enter the committitur and surrender in the marshal's book at the office of the clerk of the judgments.

This entry, before a late case, was said to be very important; until it were duly made the marshal would not, it was said, be liable in case of escape, but the bail would remain liable. *Watson v. Sutton*, 1 Salk. 272. 1 Sol. 172. who cites 6 Mod. 238. But it has now been ruled, that to make a perfect render this entry is unnecessary. *The King v. Middlessex*, (Sheriff) 2 B. & A. 607.

If the defendant be in custody of a sheriff or other gaoler at the time of the intended render at the suit of another plaintiff, or otherwise, the proper application is by a habeas corpus, which title see, to be directed to the sheriff or gaoler to bring the defendant before a judge, returnable immediately, in order to render him in discharge of his bail. And where defendant is in custody on criminal process, see the cases cited, page 245, ante.

Lodge the habeas corpus with the sheriff or gaoler; he will thereupon bring the defendant to a judge's chambers, and the same steps are thereupon taken as above mentioned; the habeas corpus (see R. G. T. 3 Ann.) is left with the judge, who signs the return thereof, and a note of such service made out by the judge's clerk is delivered over to the gaoler; a tipstaff conveys the defendant to the King's Bench prison in like manner as before; fees the same; or in case of the defendant being in other custody on a charge of felony, he is, as is above mentioned, page 245, committed to the custody of the marshal pro forma, and then re-committed to the custody from whence he was removed by the habeas corpus.

PRACTICAL DIRECTIONS, C. P.

These are much more concise in this court, from the *exoneretur* being entered in the filazer's book by the judge; for this purpose, request the filazer to attend the judge at the same time with the defendant, who is then delivered to a tipstaff, and conveyed by him to the Fleet; pay filazer 7s. 4d.; tipstaff 6s.; In the matter of *Salisbury*, 5 B. & A. 266; judge's clerk 13s.

Notice of the surrender must be given to the plaintiff's attorney, but no affidavit is necessary.

But if the action be by bill or by attachment of privilege, the clerk of the dockets must be requested to attend the judge with the bail piece, and the *exoneretur* is entered thereon instead of in the filazer's book; in this case pay 7s. 4d.; tipstaff 6s.; judge's clerk 16s.

Give notice as by original; but no affidavit is necessary.

The time of the day of the defendant's surrender was ordered to be entered by the filazer; this was to enable the court to determine whether the render were made *sedonto curia*. *Ling v. Woodyer*, Bar. 69.

BAIL, Surrender, Costs on; CASES; PR. DI.

payment of costs of proceedings against them, directed by the express direction of the rule. And see D. T. 26 G. III. K. B. Bartrum and others v. H. K. B. 1 Tidd, 559. Smith v. Lewes, 16 E. v. Hern, 1 M. & S. 742.

But if, upon a return of *non est* in plaintiff proceed against the bail, and additionally, the costs thereon, as well as action, must be paid, although the damages and costs before the court of the *ca. sa.* within which time they might have discharged the principal. Perigal v. Mellish, 5 T. the surrender take place with the *ca. sa.* allowed by the pra. 3 B. & P. 13. Acc. H. this case the proceedings in recognizance. But the court referred to the cases, where given, and yet proceedings as

that
issued
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2 N. R.

cause.)
render him-
mitted by the
marshal of the
e — day

(Attorney.)

(Title cause.)

—, gentleman, maketh oath
—, the attorney for the plaintiff
the notice hereto annexed, by de-
servant, as the case may be) of the
in —
(Signed)

THE FORMS, C. P.

The distinction
that in some cases the same, *mutatis mutandis*.
the time
on the *ante* *discharged*, or not.

P. *ante* BAIL, PROCEEDING AGAINST, ON RECOGNIZANCE. *ante*. BANKRUPTCY, COGNOVIT, *post*.
th. *ante*. Caswell v. Coare, 2 Taunt. 107, cited page 209, *ante*.
It is no ground for setting aside a judgment which has been signed against bail, that the plaintiff has accepted a composition from the defendant, and suspended the execution of a *ca. sa.* which had been issued against him, though it were without the knowledge or consent of the bail. Brickwood v. Annis, 1 Marsh. 250.

And where the bail might have applied by *audita querela*, the court refused to interfere summarily. Hewes v. Mott, Dalby v. Mott, 2 Marsh. 37. See 6 Taunt. 329. S. C. But by the case as here reported, it appears that the court intimated that bail to the sheriff were not sureties within the stat. 49 G. III. c. 121. s. 8. and consequently that where the principal was arrested by his bail, who had paid the debt after his bankruptcy, his bail upon such arrest were not entitled to be exonerated, on the ground that under this act they might, as sureties, prove the amount of money so paid by them.

Misnomer of a christian name of one of the bail in a recognizance is fatal. 1 J. B. Moore, 126.

Where there is a material variance between the *ac etiam* in the writ and the declaration, the plaintiff will lose his bail, yet the court will not on that ground set aside the proceedings for irregularity. Per Cur. M. 43 G. III. K. B. 1 Tidd, 459.

But variance between affidavit and declaration, the affidavit being on a bill for 523l. 17s. 6d. the declaration for 523 liv. 17 sou. 6 der. no ground for discharging bail. Gould v. Logette, 1 Chit. R. 639.

Variance, where
bail discharged.

Where not.

A *capias quare clausum fregit* issued against *A.* and *B.* with an *ac etiam* in debt; upon which *A.* was arrested, a special original in debt, a *capias alias* and *pluries*, and writs of exigent issued against both, and *B.* was outlawed on the 23d October; after which a declaration in debt on the original was delivered against *A.* only, entitled of Trinity term: Held, that the bail were not entitled to be discharged on a motion for that purpose upon the ground of a variance between the declaration and the process upon which the defendant was arrested. *Gent and Another v. Abbott*, 8 *Taunt.* 304.

Bail are discharged if plaintiff do not declare in time, and obtain no rule to declare. 1 *Chit. R.* 281. n.

Not declaring in time against principal. Bail not discharged.

Where one of the king's yeomen of the guard had been arrested without leave from the Lord Chamberlain, by process issuing out of the Palace Court, and that court had refused to discharge him out of custody on filing common bail, bail above was put in and perfected in that court, and after interlocutory judgment signed, the defendant removed the cause into K. B. by *habeas corpus*, and put in and perfected bail; under these circumstances the court refused to order an *exoneretur* to be entered on the bail piece. *Sard v. Forrest*, 1 *B. & C.* 139.

But where the bail may expect costs, the application for relief must not be delayed, for where *A.* sued out a *ca. sa.* against *B.* who having put in bail, became bankrupt and obtained his certificate; and *A.* in about two months afterwards signed an agreement to accept a composition from *B.* provided all his creditors would accept the same; a few days after the signature of the agreement by *A.* he levied an execution on *B.*'s bail: Held, that the *ca. sa.* against the principal, and all the proceedings against the bail must be set aside; but that as the bail had so long delayed their application, they could only be relieved on payment of costs. *Thackeray v. Turner*, 8 *Taunt.* 29. S. C. 1 *J. B. Moore*, 457.

No delay in making application.

The principal offered to surrender on the 13th May, but the plaintiff gave him time, and dispensed with the surrender, on an understanding that the bail should continue liable. On the 11th June, the bail, ignorant that the defendant had offered to surrender, signed an agreement to continue liable, the principal always declaring himself ready to surrender; but in Trinity vacation the plaintiff, without notice, issued proceedings against the bail, returnable in Michaelmas term. On the 29th October, the principal obtained his certificate under a commission of bankruptcy: Held, that the bail were discharged. *West v. Ashdown and Palfrey*, *Bail of Price*, 1 *Bing.* 164.

Where on other grounds.

The bail to the sheriff are discharged by the defendant's giving a *cognovit* for payment of debt and costs. *Farmer v. Thorley*, 4 *B. & A.* 91.

Giving *cognovit*.

The plaintiff, after final judgment, having taken bills payable at a future day in satisfaction of the debt, the court discharged the bail on payment of costs; though the application was not made till the fourth term after judgment signed. *Willison v. Whitaker*, 2 *Marsh.* 383. 7 *Taunt.* 53. S. C.

Discharge where bills taken.

Principal became bankrupt, and on the same day that he obtained his certificate, but before the rising of the court on that

Where in case of bankruptcy of principal.

day, before they could be fixed; and on payment of costs, the court entered an *exoneretur* on the bail piece. *Johnson v. Linsey*, 2 D. & R. 385. 1 B. & C. 247. S. C. And see *Thackeray v. Turner*, cited *ante*, page 253.

Yet where defendant became bankrupt before the stat. 49 G. III. c. 121. s. 14. and the plaintiff proved his debt under the commission, but did not otherwise proceed under it, the court held that the bail were liable, though the plaintiff had lain by two years before he brought his *sci. fa.* against them. *Hill v. Simpson*, bail of Jackson, H. 26 G. III. K. B. 1 *Tidd*, 317; but see *Aylett v. Harford*, 2 Bl. R. 1317. See title ELECTION, *post*.

If after bankruptcy and certificate, proceedings are taken against the bail, the court will, on motion, relieve them, and will not direct an issue to try the fact of the bankrupt's being a trader; the certificate by statute 5 G. II. c. 30. s. 7. & 13. being made sufficient evidence of the trading, &c.

But no *exoneretur* having been entered on the bail piece, such relief was granted only on payment of costs. *Harmer v. Hagger*, 1 B. & A. 332.

The court will not relieve the bail of a bankrupt, who are fixed, between the signature of the bankrupt's certificate by his creditors and the commissioners, and the time of the allowance of the certificate by the Lord Chancellor. *Stapleton v. Macbar*, 7 Taunt. 589. *Semble*, that a bankrupt's certificate has no relation back to any earlier period than the Lord Chancellor's allowance thereof. *Id. ib.*

And where the bail seek to be exonerated, from the defendant's having become bankrupt and obtained his certificate, the court will direct an issue, for the purpose of trying whether the certificate were obtained fairly or not. *Woolcot v. Leicester*, 6 Taunt. 75.

The court will not order an *exoneretur* to be entered on the bail piece, on the ground of the defendant's having obtained his certificate in Ireland, but will direct an issue, in order to ascertain the circumstances under which the original debt was contracted. *Bamfield v. Anderson*, 5 J. B. Moore, 331.

A plaintiff having obtained bail to his action, sued in equity for the same cause, and being put to his election by the Court of Equity, elected to proceed there, and a perpetual injunction went not to proceed at law: Held, that this was no ground for discharging the recognizance of the bail. *Horsley v. Walstab*, 7 Taunt. 235.

And if a plaintiff swear positively to aailable cause of action, the court will not try upon affidavits whether the transaction be such an one whereon no legal debt can arise. - *Id. ib.*

BAILIFF. See title ARREST, page 89, *ante*.

Of this officer somewhat hath been said, page 89, *ante*. Indeed, much of the titles ARREST, BAIL, BAIL BOND, ESCAPE, EXECUTION, EXTORTION, GAOLER, SHERIFF, &c., more or less involve his functions, ultimate liabilities, &c.

In addition to what, under those and other titles appropriate to the office and duty of sheriff, will incidentally be found, it

should seem useful to mention a few modern decisions affecting BAILIFF.

A sheriff's officer is not liable to the penalties of the statute 32 G. II. c. 28. s. 1. for carrying a defendant in execution to prison within twenty-four hours [after caption], that clause only relating to persons arrested on mesne process. *Evans v. Atkins*, 4 T. R. 555.

Where the bailiff had forborne to arrest a defendant, upon his promising to put in good bail, and afterwards, on hearing that such bail would not be forthcoming, he cannot put in bail without the consent of the defendant; and then, accompanied by the bail so put in, take the defendant into custody the day before the defendant's time for putting in bail expired. In this case the court discharged the defendant and made the bailiff pay costs. *Taylor v. Evans*, 1 Bing. 367.

See *Atkinson v. Jameson*, 5 T. R. 25. *Atkinson v. Matteson*, 2 T. R. 172.

The apparent difference between the decisions in these two cases might create some doubt as to whether, after a voluntary escape, the bailiff might re-take the defendant on mesne process, before the return of the writ; but the reasoning of the court in *Atkinson v. Matteson*, cited above, as well as what I believe is the practice, seems conclusive.

It has been mentioned, *ante*, page 89, that appointing a *special bailiff* discharges the sheriff. And see *Porter v. Viner*, 1 Chit. R. 613. n. *Pallister v. Pallister*, *Id. ib.*

BALLOTING ACT. See title JURY, *post*.

BANK OF ENGLAND. See title INSPECTION OF BOOKS, *post*.

BANK NOTE. Cannot be taken in execution. *Francis v. Nash*, Ca. temp. Hardw. 53.

See titles AFFIDAVIT OF DEBT, page 12, *ante*. TENDER, *post*.

Whether to negative the tender on bank notes be now necessary may be well doubtful. I should think the clause may be altogether now omitted in the affidavit of debt.

BANKRUPT. Points relating to bankrupt and bankruptcy frequently occurring in the progress of a suit, it may be expedient to notice some of the more modern cases, wherein bankrupt and bankruptcy appear to be connected with *practice*.

It seems that the proving a debt under a commission, is an election by the creditor within the statute 49 G. III. c. 121. s. 14, which deprives him of his remedy by action against the bankrupt in the cases excepted in the statute 5 G. II. c. 30. s. 9. 3 M. & S. 72.

As to what shall be deemed election not to proceed against bankrupt.

The proving a debt under a commission of bankruptcy issued against a person who had before compounded with his creditors, and whose estate under the commission had not, nor would produce 15s. in the pound, but who, before he became bankrupt, paid the creditors with whom he compounded the full amount of their

debts, was held to discharge the bankrupt, in respect of his future estate and effects, from an action for the debt so proved. *Read v. Sowerby*, 3 M. & S. 78.

Where a bankrupt brought trespass against the messenger, and was nonsuited, but the validity of the commission was not fully tried, and afterwards brought trover against the assignees, held that he should not be compelled to give security for costs, *semble aliter*, if the validity of the commission had been once fully tried. *Kenney v. Duff*, 2 Smith, 423; yet where an uncertificated bankrupt brought an action for the benefit of his assignees, the court required security for the costs. See 1 Chit. R. 276. n.; but Lord Kenyon, C. J. said it was not intended that an uncertificated bankrupt should, in all cases be required to give such security. *Webb v. Ward*, 7 T. R. 296; therefore, where a bankrupt sued for earnings since his bankruptcy, he was not held compellable to give such security. *Cohen v. Bell*, T. 44 G. III. 1 Tidd, 553.

Nor where the plaintiffs were bankrupts and in prison. *Anon. 2 Taunt.* 61.

Where bankrupt privileged from arrest, or not.

A bankrupt, under certain circumstances, is privileged from arrest, but in order to be protected, he must make an actual surrender. See title ARREST, page 91, *ante*. *Kenyon v. Solomon*, 1 Cowp. 156; and if afterwards arrested, and giving the officer a copy of the summons or notice, under the hands of the commissioners or assignees, he shall be discharged, and if detained, the officer is to forfeit to the bankrupt 5*l.* *per diem*. Stat. 30 G. II. c. 30. s. 5.

A bankrupt shall not be held to bail on a promise made subsequently to his certificate, to pay a debt due before his bankruptcy. *Bailey v. Dillon*, Burr. 736. But see *Drew v. Jefferies*, H. 26 G. III. K. B. 1 Tidd, 231. But an action will lie on such promise. Burr. 736. The commission should be unimpeachable. *Powley v. Jones*, 1 Bl. R. 725. *Martin v. O'Hara*, Cowp. 823; and the certificate fairly obtained. *Robson v. Calye*, Doug. 228; and see *Peers v. Gadderer*, 1 B. & C. 116.

Commissioners of bankrupts cannot give a bankrupt a protection for an unlimited period of time, in order to enable him to make a full discharge of his estate and effects. *Claughton v. Leigh*, 1 B. & C. 652.

Commission does not prevent taking on escape.

But a bankrupt having escaped out of the custody of the marshal, and being at large, surrendered to a commission subsequently issued, and receives the protection conferred by stat. 5 G. II. c. 30. s. 5. Held, that he may, notwithstanding, be taken and detained in custody by the marshal. *Anderson v. Hampton*, 1 B. & A. 308.

Where a warrant of commitment by commissioners of bankrupts, after setting out the issuing of the commission, the adjudication of bankruptcy, &c. stated, as the ground of commitment, that the bankrupt, being brought before them, and they having proposed to administer an oath to him, he refused to be sworn, or to give an account of his property: Held, that such warrant was legal, and that it is not necessary in it to set out any specific question in such case; for this is a refusal to answer all possible

questions which can be suggested : Held also, that after the issuing the writ of *habeas corpus*, and before the return of it, the commissioners may, if necessary, make a fresh warrant, stating more fully the cause for detaining the bankrupt in custody, and that such warrant may by words of reference incorporate the formal parts of the first warrant : Held also, if both warrants are defective in form, the court will, if a substantial cause of commitment appear, re-commit the bankrupt *ex officio* : Held also, that a commitment by a justice of the peace, under 5 G. II. c. 30. s. 14, of the bankrupt, "until he shall be discharged by due course of law," is bad. *Ex parte Page*, 1 B. & A. 568.

Where the plaintiff had petitioned for a sequestration in Scotland against the defendant, this was holden not to be a sufficient cause for discharging him on common bail. *Carruthers v. Parkin*, H. 41 G. III. K. B. 1 *Tidd*, 228.

The court will not discharge a defendant on entering a common appearance, on the ground of his having become insolvent and obtained his certificate at Newfoundland, under the 49 G. III. c. 27. s. 8. but will leave him to plead his certificate in bar. *Philpots v. Reid*, 1 J. B. *Moore*, 244.

The two months lying in prison, and on which a commission of bankrupt may issue, are lunar, and the day of the arrest is to be considered as the first day. *Glassington v. Rawlins*, 3 East, 307.

Generally the bankrupt's certificate is a bar to any action commenced on account of a debt or cause of action subsisting before, or at the time of the bankruptcy, but by stat. 49 G. III. if assignees become bankrupt, and have 100*l.* of former bankrupt's estate in their hands, their certificate shall be no bar ; the person, tools, goods, and furniture of such bankrupt assignees are, however, not liable.

To what certificate a bar.

Cognovit given in an action for a debt, interest, and costs, incurred after a secret act of bankruptcy, is discharged by bankruptcy and certificate. *Vansandon v. Corsbie*, 1 Chit. R. 16.

Where debt exists before bankruptcy, the interest and costs, even of a writ of error accruing afterwards, are discharged as well as the debt, but where no demand is for damages, certificate is no bar. *Id. ib.*

In such cases the defendant should plead the certificate, which if he neglect to do, he may be arrested on the judgment obtained against him. *Coombes v. Blackall*, 1 Str. 477.

Where certificate to be pleaded.

But a general plea of bankruptcy must be delivered and not filed ; but on affidavit of merits, the court set aside judgment signed for want of plea on terms. *Henderson v. Sanson*, 1 Chit. R. 225.

If the certificate be not obtained until after judgment, whether in the original action or after error brought, the same must be verified by affidavit, and on application made to a judge in vacation, or to the court, in term time, the person will be discharged. *Graham v. Benton*, 1 Wils. 41, but not the goods, if the levy were made before certificate allowed. *Callan v. Meyrick*, 1 T. R. 361. See also, stat. 5 G. II. c. 30. s. 13.

Where certificate not obtained till after judgment.

Where the bankrupt is clearly entitled to his discharge, the court on motion, or a judge on summons, to avoid circuitry, have ordered an *exoneretur* to be entered on the bail piece, without the form of a regular surrender by his bail. 1 *J. B. Moore*, 457; but see 8 *East*, 609. And this was allowed on motion in the King's Bench, where the certificate was not obtained till after the return-day of the *capias ad satisfaciendum*. *Cleveland v. Dickenson*, Bail of Tomkins and Another, *E.* 41 G. III. K. B. 1 *Tidd*, 311.

But a bankrupt who has been waived or outlawed, and her person arrested and goods taken by the sheriff under a writ of *capias utlagatum*, is not entitled to be relieved on summary motion from such arrest and levy, except upon the terms of appearing to the action, and putting in and perfecting special bail, although the plaintiff had also proved her debt under the commission, and received a dividend, after which this action was commenced for the balance. *Summervil v. Watkins*, 14 *East*, 586.

In action against M. P. two persons became sureties, in a bond conditioned for the payment of such sum as should be recovered, with costs. The cause proceeded, and notice of trial being given, the defendant filed a bill in equity, and obtained an injunction, pending which he became bankrupt. Having suffered a term to elapse after obtaining his certificate without pleading it, the court refused to let him plead it as of the former term, except on condition of dismissing his bill in equity, and paying all costs at law and in equity as between attorney and client. *Duff v. Campbell*, 3 B. & A. 577. *S. P. Hunter v. Campbell*, 1 *Chit. R.* 781.

Where defendant omitted to plead certificate.

Effect of commission on bail-bond.

Bankruptcy supersedes an execution.
Stat. 49 G. 3.
Practical provisions therein.

As to proceeding on bail bond, and proving the original debt under the commission, and otherwise as to the effect of the commission on bail bond, see title BAIL BOND, page 202, *ante*.

Bankruptcy is a *supersedeas* of a writ of execution. *Smallcomb v. Cross*, 1 *Ld. Ray.* 252, and stat. 49 G. III. c. 1. has provided, that execution, levied two months before the commission hath issued, shall be valid: this is a most material alteration of the former law and practice with relation to execution levied on the effects of persons who afterwards were declared bankrupts; for the commission was deemed to relate back to the act of bankruptcy; if therefore the levy were made after an act of bankruptcy, the assignees might recover back the whole levy from the creditor, who thus, by an act of which he was totally ignorant, was defeated of the fruits of his judgment, obtained perhaps at great trouble, and certainly at great cost. The thus limiting the retrospective operation of the commission, is certainly not among the least wise and convenient provisions of this important act.

By another practical provision in the same statute, the commission and the proceedings under it are to be deemed evidence of the debt of the petitioning creditor in an action commenced by and against the assignees, unless notice be given that those matters are to be disputed. See NOTICE, FORM subjoined.

And it has been determined that this notice is not to be considered as part of the defendant's regular evidence in the cause, but may be proved at the beginning of the trial, and immediately

puts the plaintiff [party] upon strict proof of the trading, petitioning creditor's debt, and act of bankruptcy. *Decharme v. Lane*, 2 *Campb.* 324.

And the notice may be served on the assignee by delivery to his attorney. *Howard v. Ramsbottom*, 3 *Taunt.* 526.

But service by leaving the notice with a maid servant at the dwelling-house of the assignee, is not sufficient service. *Id. ib.*

But if the title of assignees of a bankrupt's estate, strangers to the record, comes in question incidentally, it must be proved in the same mode as before the stat. 49 G. III. c. 121. although no notice of contesting the bankruptcy has been given by the opposite party. *Doe, d. Mawson v. Liston*, 4 *Taunt.* 741.

Also, that no action is maintainable for the dividend as heretofore, but that it is recoverable only by petition to the Lord Chancellor, s. 12.

Also, that bankrupts in custody on execution may be brought up for examination before commissioners, s. 13.

Also, that proving or claiming a debt under a commission of bankrupt, is an election not to proceed at law, s. 14.

A bankrupt, on delivering up leases, or agreements, &c. to his assignees, is now discharged from future breaches, and the lessor may call on the assignees to elect as to whether they will or not accept such lease or agreement, s. 19.

And, lastly, if he be in custody, and the creditor prove his debt, the bankrupt may petition the Lord Chancellor for an order that the creditor may make election to proceed at law, or abide by his proof of the debt.

Quære, whether K. B. have authority to direct a prohibition to the Lord Chancellor, sitting in bankruptcy? *Ex parte Cowan*, 3 *B. & A.* 123.

A levy under writ of *feri facias* is valid, if executed before allowance of certificate. *Callen v. Meyrick*, but not a *ca. sa.* *In what case feri facias held valid.* 1 *T. R.* 361. See also *Lister v. Mundell*, 1 *B. & P.* 427.

But where the sheriff took possession under a *feri facias*, and at a later hour of the same day the defendant surrendered in discharge of his bail, and afterwards lay in prison two months, and thereby committed an act of bankruptcy, and by the statute of *James* was a bankrupt from the time of his arrest: Held, that in an action by his assignees to recover the value of such goods, the court would notice the fraction of a day, and therefore that the sheriff having entered before the bankrupt had surrendered in discharge of his bail, the assignees were not entitled to recover. *Thomas v. Desanges*, 2 *B. & B.* 586.

Trespass will not lie against the sheriff for taking the goods of a bankrupt in execution, after an act of bankruptcy and before the issuing of the commission, notwithstanding he sell them after the issuing of the commission, and after a provisional assignment and notice from the provisional assignee not to sell. *Smith v. Milles*, 1 *T. R.* 475. *Of trespass against the sheriff.*

And where A. and B. were partners, and A. committed an act of bankruptcy, and afterwards, but before the bankruptcy of B., the sheriff seized goods which had belonged to A. and B. under an ex-

ecution against them, it was held, that the assignees of A. and B. under a joint commission could not, suing as such, recover A.'s share of the property therein. *Hogg and Another, Assignees, &c. v. Bridges and Another*, 8 *Taunt.* 200.

If a sheriff legally take goods in execution, the proprietor whereof afterwards becomes a bankrupt, and the sheriff sells at one time after the bankruptcy enough to satisfy both that execution and also another execution, which being delivered to him after the bankruptcy, is void, the bankrupt's assignees may recover in trover for such of the goods as were sold after the sheriff had raised money enough to satisfy the first execution. *Stead and Others, Assignees, &c. v. Gascoigne*, 8 *Taunt.* 527.

Where a trader committed an act of bankruptcy on the 9th of November, and the sheriff took his goods in execution on the 16th, and sold them on the 21st December, and a commission was issued on the 23d, and an assignment made on the 6th January following: Held, that the assignees might maintain trover against the sheriff, although he had sold before the assignment was made, as the bankrupt's property vested in them by such assignment from the act of bankruptcy by relation. *Lazarus v. Waithman*, 5 *J. B. Moore*, 313. See title *SETT OFF*, *post*.

Where effects of a bankrupt under second commission are, or are not, discharged.

The effects of a bankrupt, under a second commission, are not discharged, unless his estate shall have paid 15s. in the pound. And an action will lie at the suit of a creditor against such bankrupt, although such creditor shall have signed his certificate. *Philpot v. Corden*, 5 *T. R.* 287.

As to surety paying debt after bankruptcy. Observation.

By statute 49 G. III. s. 8. sureties, paying debts after the commission, may prove them under it; it is presumed, therefore, that the case of *Paul v. Jones*, 1 *T. R.* 599. and several other cases that fall within the principle of that decision, will cease to influence the practice of holding bankrupts, though they may have obtained their certificates to bail, or suing them at the instance of a surety who may have made such subsequent payment, and from the operation of this late statute, the doctrine laid down in *Chillon v. Whiffin*, 3 *Wils.* 13, both as to this point and that of breaches subsequent to bankruptcy, will be very much narrowed. For a case of equitable liability of the bankrupt destroyed by this statute, see *Wood v. Dodgson*, 1 *M. & S.* 195.

Where a surety in a warrant of attorney, in order to discharge himself from his personal liability, paid part of the debt due to the creditor of a bankrupt who had proved under the commission, and thereupon satisfaction was entered on the record: Held, that this did not fall within the 49 G. III. c. 121. s. 8. as being a payment of part of a debt in discharge of the whole, and that consequently the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him. *Soutten v. Soutten*, 5 *B. & A.* 852. And see *Flanagan v. Watkins*, 3 *B. & A.* 186. This judgment has lately been confirmed in error. Not yet reported.

Quære.

But *quære* as to whether cases falling within the principle of *Howis v. Wiggins*, 4 *T. R.* 714, and the memorable case of *Cowley v. Dunlop*, 7 *T. R.* 565. are affected by this statute. And see title *BAIL, where discharged or not*, *ante*.

But the bankrupt will not be discharged from a new security given by him to obtain his liberty subsequently to his bankruptcy, before his certificate, although he afterwards obtain it. *Birch v. Sharland*, 1 *T. R.* 715. Where bankrupt not discharged.

A bankrupt having promised, after his bankruptcy, and before certificate, to pay a debt due before the bankruptcy, indorsed to the plaintiff two promissory notes for that purpose: Held, that his certificate was no bar to an action on these notes. *Brix v. Braham*, 1 *Bing.* 281.

It may seem that trover will lie, notwithstanding bankruptcy and certificate. *Parker v. Norton*, 6 *T. R.* 695. *Tamen quære.*

Costs taxed on verdict not obtained till after bankruptcy on a previous debt, like the debt, are proveable under the commission. *Lewis v. Piercy*, 1 *H. Bl.* 29. So, likewise, costs of nonsuit on action, brought by plaintiff previously to his bankruptcy, although before that event they shall not have been taxed, are proveable under the commission. *Hurst v. Mead*, 5 *T. R.* 365. *Watts v. Hart*, 1 *B. & P.* 134. See also *Longford v. Ellis*, 1 *H. Bl.* 29, n. In the case of *Watts v. Hart*, 1 *B. & P.* 134, above mentioned, C. P. very much doubted the principle of the preceding case of *Hurst v. Mead*, 5 *T. R.* 365. But costs awarded before, and not taxed till after bankruptcy, are not proveable under the commission; the bankrupt remains liable to be attached for the amount under the award made a rule of court. *The King v. Davis*, 9 *East*, 318. And it has been since held, that a debt due on a judgment signed in an action for damages after an act of bankruptcy committed by the defendant, and a commission issued thereon, is not discharged by the certificate, though the verdict were obtained before the bankruptcy. *Buss v. Gilbert*, 2 *M. & S.* 70. See also *Ex parte Charles*, 14 *East*, 197, which overturned *Longford v. Ellis*, 1 *H. Bl.* 29, n. above cited. See also *Bamford v. Barrell*, 2 *B. & P.* 1. And it has at length been determined in C. P. that if a plaintiff, after a verdict found for the defendant, but before judgment signed, become bankrupt, the costs are not a debt proveable under the commission, and execution for them may issue against him, notwithstanding his certificate. *Walker v. Barnes*, 1 *Marsh.* 346. Yet where plaintiff sued defendant for a debt due before the bankruptcy of the defendant, and went on with the suit after his bankruptcy, and had judgment, and defendant obtained his certificate, and afterwards brought a writ of error, which was non prossed, and costs of non pros in error awarded against him, it was held that the defendant was discharged by his certificate from these costs. *Scott v. Ambrose*, 3 *M. & S.* 328.

So, likewise, the costs of *scire facias* to revive a judgment, may be proved under the commission. *Philips v. Brown*, 6 *T. R.* 282. Also in error, *ibid.* and consequently in all these cases the certificate is a bar. *ibid.*

A preference of a creditor by a bankrupt under apprehension of legal process, however groundless, is valid. *Thompson v. Freeman*, 1 *T. R.* 155.

Bankruptcy and certificate discharge an attachment for not performing an award. *Baker's case*, 2 *Str.* 1152. And so where

Trover not discharged by certificate.

Where costs are, or are not, proveable.

Where bankrupt may shew preference.

Bankruptcy an answer to award.

BANKRUPT; CASES; PRA. DI.; FORM.

from bankruptcy the defendant is unable to pay a sum awarded, the court refused an attachment. Anon. K. B. 1 *Cromp.* 270. cited *Tidd*, 866.

But not to an extent.

The king does not seem to be barred by the certificate. The King *v.* Davis, 9 *East*, 318, cited *ante*, p. 261. Nor on extent.

PRACTICAL DIRECTIONS

As to obtaining Bankrupt's Discharge out of Custody.

*A summons to shew cause why the bankrupt should not be discharged out of custody, he having obtained his certificate, will be granted on application at a judge's chambers of either court; serve copy thereof on the plaintiff's attorney; it is said that this summons, in case of non-attendance, must be twice renewed; on the return of the first summons, be ready with an affidavit, stating that the debt accrued before he became a bankrupt, and that he had duly, and without fraud, obtained his certificate, which may be ready to be produced. But if the plaintiff's attorney should not attend, an affidavit of the due service of the summons should also be prepared and sworn. As to when the bankrupt will be put under terms, see Summervil *v.* Watkins, 14 *East*, 536. also cited page 258, *ante*. Also title SUMMONS, Forms thereto subjoined.*

FORM.

[Court.]

[Title Cause.]

Form of notice of intention to dispute commission.

Take notice, that the defendant in the above cause intends at the trial thereof to resist and dispute the validity of the commission of bankruptcy awarded and issued against the said ———, in the pleadings in this cause named; also the act of bankruptcy upon which the said commission is supposed to be founded, and the petitioning creditor's supposed debt, on which the said commission is supported, as well as the right and title of the above-named plaintiffs to support the action as such assignees as aforesaid under the commission against the defendant herein. And I do hereby also give you notice, that you will be required to prove upon the trial of the said cause the supposed act of bankruptcy upon which the said commission is founded, and the petitioning creditor's debt; and further, that you do produce upon the said trial the said commission, and all proceedings whatsoever had or taken under the same. Dated ———, 18—.

Your's, &c.

To Mr. ———, plaintiff's attorney.

Defendant's attorney.

Assignees may sue in debt and in detinet.

May bring a real action.

Where they recover under 40s.

BANKRUPT, ASSIGNEES OF.

Assignees of a bankrupt may sue in *debet* and *detinet*. Winter *v.* Kretchman, 2 *T. R.* 46.

And they may also, in virtue of the assignment, bring a *real action*. Smith *v.* Coffin, 2 *H. Bl.* 444.

Where assignees were plaintiffs, and a sum under 40s. was recovered, the court gave leave to enter a suggestion, under the stat. 22 *G. II.* c. 47. although it was objected, that a court of conscience has no authority to try a question of bankruptcy. Key and another, Assignees, *v.* Rigg, 1 *B. & P.* 11.

So the statute 39 & 40 *G. III.* c. 104. extends to assignees of a bankrupt; and therefore where a plaintiff as assignee recovered less than 5*l.*, the court ordered a suggestion to be entered on the record to deprive the plaintiff of costs: but defendant having given

notice of his intention to dispute the petitioning creditor's debt, &c. (which was proved at the trial), it was holden that the plaintiff was entitled to the costs thereby occasioned; and the court ordered the suggestion to be entered accordingly. *Ward, Assignee, v. Abraham*, 1 B. & A. 367.

Where a party was described in a commission of bankrupt as a dealer in a particular trade, and the evidence of dealing was in a different trade, the court allowed a new trial, on the ground of surprise. *Hale v. Small and Others*, 8 Taunt. 730. 4 J. B. Moore, 415. 2 B. & B. 25. S. C.

A separate commission having issued against A., and a joint commission against A. and B., the assignees under the separate commission obtained a verdict against E., the court ordered the money to be paid into court until a petition, pending before the Lord Chancellor to supersede the separate commission, was decided. *Hodgkinson v. Travers*, 1 B. & C. 257.

Where the plaintiff, after judgment and writ of error allowed, became bankrupt, the assignees cannot sue out a *scire facias* in their own names, to compel an assignment of errors till some judgment be given, and then it must be done immediately after such judgment; but they should have proceeded in the name of the bankrupt till judgment. *Kretchman v. Beyer*, in error, 1 T. R. 463.

Where assignees cannot issue *scire facias* in their own names, until, &c.

Nor can assignees make themselves parties to the record, in an action commenced by the bankrupt in any intermediate stage of the proceedings, but it must be immediately after judgment, although interlocutory. *Ibid.*

When they may become parties to the record.

Where an action is brought, and defendant arrested in the name of a bankrupt, by assignee, he cannot be again arrested at the suit of assignees till the costs are taxed and paid. *Carter v. Hart*, 1 Chit. R. 276.

The provisional assignee of a bankrupt brought an action of assumpsit against the defendant, who pleaded the general issue, held, that the fact of the bankrupt's estate having been assigned by such assignee to the new assignees, between the time of the issuing the writ and the delivery of the declaration, was no ground of nonsuit on that plea. *Quare*, if it would have been an answer to the action if specially pleaded? *Page v. Bauer*, 4 B. & A. 345.

Where a bankrupt was required by his assignees, on his last examination, to deliver to them his books of account, which he did, held, that he must be deemed to have delivered them on compulsion; and it being afterwards found that he was not a trader, held, that he might support an action of trover against such assignees, without any previous demand of the books. *Summerset v. Jarvis and Another*, 6 J. B. Moore, 56.

Where bankrupt may sue them.

BANKRUPTCY. And see title BAIL, where discharged or not, *ante*. Also the previous titles BANKRUPT, BANKRUPT, ASSIGNEES OF.

Bankruptcy of plaintiff is a good bar to an action. 1 Chit. R. 276, n.

In C. P. in the case of *Pilcher v. Martin*, 3 B. & P. 171, it was held that a plea of bankruptcy, if not signed by a serjeant, might be treated as a nullity; but in K. B. such a plea need not be signed by counsel. *Leigh q. t. v. Monteiro*, 6 T. R. 496.

Plea of, must be signed in C. P. *Aliter*, K. B.

Where bankruptcy occurs since the last continuance.

Where one of many severs and pleads bankruptcy.

Where bankruptcy relieves bail.

Bail above are not sureties within statute.

General plea of bankruptcy must be delivered and not filed; but on affidavit of merits, court set aside judgment signed for want of plea on terms. *Henderson v. Sansom*, 1 *Chit. R.* 225.

If bankruptcy and certificate have occurred since the return of the *venire facias*, which is the last continuance, it was said *arguendo* that such matter must be pleaded specially, and not generally, under the statute 5 G. II. c. 90; but the court gave no opinion on the point. *Lindo v. Simpson*, 2 *Smith*, 659; but Mr. Tidd, page 878, 7th edit. coincides with the counsel at the bar; and see 6 *East*, 413. 2 *Smith*, 439. S. P. 2 *H. Bl.* 553. 9 *East*, 82.

Where one of many joint defendants severs and pleads bankruptcy, the plaintiff may enter a *nolle prosequi* as to him, and it shall not discharge the others. *Noke v. Ingham*, in error B. R. 1 *Wils.* 89. See also *Baxter v. Nichols*, 4 *Taunt.* 90. And joint contractors must be all sued, although one has become bankrupt and obtained his certificate; and, if not sued, the others may plead in abatement. *Bovill and Another v. Wood and Another*, 2 *M. & S.* 23.

But an action does not abate by the plaintiff's becoming bankrupt. *Waugh v. Austin*, 3 *T. R.* 437. *Hewitt v. Mantell*, 2 *Wils.* 372-4.

As to bail being relieved by the bankruptcy of the defendant, it of course implies that the certificate must be obtained before they are fixed. *Woolley v. Cobbe*, 1 *Burr.* 244; and they are to be discharged by summons for an *exoneretur*. The cases conflict upon this question; and therefore see *Martin v. O'Hara*, *Comp.* 824; *Ray and Others v. Hussey*, *Barnes*, 104; *Joseph v. Orme*, 2 *N. R.* 180; *Willet v. Pringle*, *Id.* 190; but see *Pedder v. Mac Master*, 8 *T. R.* 609; and although the certificate were not obtained till after the return day of the *ca. sa.* *Cleveland v. Dickinson and Another*, *Bail of Tomkins*; *E.* 41 G. III. K. B. 1 *Tidd*, 311.

Where the validity of the commission is disputed, the court will direct it to be tried on a feigned issue, notwithstanding the certificate before an *exoneretur* is entered. *Willison v. Smith*, *E.* 22 G. III. K. B. 1 *Tidd*, 312. But see *Harmer v. Hagger*, 1 *B. & A.* 332.

Bail above are not sureties or persons liable for the debt of a bankrupt within stat. 49 G. III. c. 121. s. 8. *Newington v. Keeyes*, 4 *B. & A.* 493. See title *EXONERETUR*, *post*.

But it has been determined that if an action be commenced, and the defendant become bankrupt and obtain his certificate, and afterwards permit judgment to be signed for want of a plea, after which the plaintiff proceed against the bail, the court will not relieve the bail on motion. *Clarke v. Hoppe and Another*; *bail of Wilson*, 3 *Taunt.* 46. And *semble*, that they could in no mode take advantage of the bankruptcy and certificate. *Ib.*

Not even the certificate will discharge bail in error. *Southcote v. Braithwaite*, 1 *T. R.* 624.

Commissioners of bankrupts are not liable to an action of trespass for committing a person who does not answer to their satisfaction when examined before them, touching the estate and effects of a bankrupt. *Doswell v. Impey*, 1 *B. & C.* 163.

Other cases as to *bankruptcy* might be mentioned in this place, Observation. but as they will fall to be mentioned under other heads of *practice*, further notice of them will be postponed till those heads occur in the order of the alphabet; besides, like many other cases of *practice*, points as to *bankruptcy* may involve questions of pleading, and therefore as this work cannot be expected to embrace the nice formalities of that department, it has been thought more expedient wholly to omit the mention of such points, rather than mention, and not wholly satisfy, the practitioner.

See titles BAIL BOND, *ante*; ERROR, SCIRE FACIAS, VENUE, *post*.

BAR, PLEA IN. See the special PLEA IN BAR by its title, and title PLEAS; PLEADING.

BARGAIN AND SALE. See title ENROLMENT OF DEEDS.

BARON AND FEME.

By these terms the law recognizes husband and wife. In an- Observation. cient and in modern legal treatises, notwithstanding the change of most other terms by which other relations in civil society were formerly distinguished, the law affecting this particular relation is to be found under this title.

Much of the practice relating to *baron and feme* is so much connected with points of law and pleading, that it is not very easy in a work of this description, neither would it be very useful to enter largely into the doctrines scattered throughout the books relating to the action brought or defended by persons in this state of life.

A husband and wife may have claims in right of each other; and each is subject to liabilities; but these are questions of law rather than of practice. Those points which are practical will be sub-joined.

As to whether the marriage of a *feme sole* subsequently to process and appearance may or may not affect the suit, see title ABATEMENT, *ante*.

If process not bailable issue against husband and wife, service on the husband only is sufficient for both. *Buncombe v. Love and Wife*, *Bar.* 406; *Collins v. Shepland and Wife*, *Id.* 412; and, on affidavit of such service, appearance may be entered according to the statute, &c. *Ibid.* Where process not bailable issues against husband and wife.

If in an action against husband and wife, the wife only be arrested, the court will discharge her upon common bail; but if the husband be arrested in such action, he shall put in bail as well for his wife as for himself, before he shall be discharged. But see *Coulson v. Scott and Wife*, 1 *Chit. R.* 75, where it is said that he may justify bail for himself, and file common bail for his wife. If a *feme covert* be the only defendant, it is generally true, that she shall be discharged upon common bail. But it is necessary that that fact should be accurately stated in the affidavit; and therefore where it was sworn that she was a married woman, as by certificate annexed will appear, it was held insufficient. *Hervey v. Cook*, 5 *B. & A.* 747. And she must apply on her own personal oath of the fact of coverture, and not upon the affidavit of another. *Jones v. Lewis*, 7 *Taunt.* 55. Where wife only arrested, &c.

Where wife obtains credit by fraud.

But if it appear that she obtained credit by fraud, as by pretending herself single, the court will not discharge her upon common bail, but leave her to plead her coverture. *Pearson v. Meadon*, 2 Bl. R. 903. *Partridge v. Clarke*, 5 T. R. 194. *Notes on Rules and Orders*, K. B. 245.

In an action against a *feme covert* the court would not upon a summary application cancel the bail bond, and permit defendant to file a common appearance where much of the debt sued for was contracted before the defendant disclosed her coverture, where she acted with great duplicity in eluding payment, and at the time of the application was residing out of the jurisdiction of the court. *Luden v. Justice*, 1 Bing. 344; and see *Wilson v. Campbell*, M. 20 G. III. K. B. 1 *Tidd*, 221, where it was held that if the fact of the coverture be doubtful, or she has obtained credit by imposing herself on the plaintiff as a *feme sole*, she must find special bail, and plead her coverture or bring a writ of error. *Id. ib.*

See also titles ARREST, *ante*; FEME COVERT, *post*.

Nor in an action at the suit of an indorsee against a *feme covert*, as the acceptor of a bill of exchange, will the court order the bail bond to be delivered up to be cancelled, although it were sworn that the drawer of the bill knew of the defendant's coverture. *Prichard v. Cowlam*, 2 Marsh. 40.

A married woman arrested on mesne process is entitled to be discharged out of custody on filing common bail, although her husband had absconded, and the debt had been incurred by her while a *feme sole*. 1 B. & A. 165.

Husband and wife being arrested for a debt contracted by the latter *dum sola*, the rule for cancelling the bail bond given by the wife for the irregularity was made absolute, but *without costs*. *Taylor v. Whittaker and Wife*, 2 D. & R. 225.

Where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband and wife, the court refused to quash the writ, though the husband swore that before and at the time of the arrest he was in the actual employment of the ambassador, and in daily attendance upon him in writing despatches and other official documents. *English v. Caballero and Wife*, 3 D. & R. 25.

But where husband and wife being arrested the latter is discharged out of custody on filing common bail, and plaintiff declares against the husband alone, it was held irregular. *Cattarius v. Player and Wife*, 3 D. & R. 247.

Where a married woman has been arrested as acceptor of a bill of exchange at the suit of an administratrix, to whose intestate the bill was indorsed, the court of C. P. will order the bail bond to be cancelled, on affidavits that the drawer and intestate knew at the time the bill was drawn, accepted, and transferred, that the defendant was a married woman. *Holloway v. Lee*, 2 J. B. Moore, 211. But where she issues a bill of exchange she may be arrested as a *feme sole*, and the court, as she did not, on application to be discharged, swear she was a married woman, refused to discharge her. *Jones v. Lewis*, 7 Taunt. 55.

Where the solicitor for a defendant sued jointly for a debt due from her *dum sola* appears on his undertaking, and pleads for the

husband only, the plaintiff (having caused the wife to be served with a copy of the process) may appear for her according to the statute, and treating the plea so put in by the husband alone as a nullity, sign judgment for want of a plea. *Russell v. Buchanan*, 6 *Price*, 139.

It has been much agitated, whether a *feme covert*, living apart from her husband, having a separate maintenance secured to her by deed, could contract and be sued as a *feme sole*; but it has at length been determined in argument before all the judges, that a *feme covert* so circumstanced could not be sued. *Marshall v. Rutton*, 8 *T. R.* 545. *Contra Cox v. Hitchin*, determined somewhat previously to this.

Where wife lives apart from her husband.

A *feme covert*, on being arrested, was discharged on filing common bail, though separated from her husband by a divorce *à mensa et thoro*, she having appealed against the sentence of divorce, which appeal was pending at the time she was arrested. *Hookham v. Ann Chambers*, 6 *J. B. Moore*, 265.

The custom of London, that a *feme covert* is liable, as a sole merchant, would form an exception to the decision in *Marshall v. Rutton*; but as sole trader, according to that custom, she cannot be sued in the superior courts, and even in those of London, it is said, the husband must be joined for the sake of conformity. *Beard and Ux v. Webb*, in error, 2 *B. & P.* 98. See also *Clayton v. Adams*, 6 *T. R.* 605.

Exception as to the custom of London.

But where a foreigner contracts debts in England, her husband being abroad, although she be not separated by deed, and although she have no separate maintenance, yet she shall be held liable. *Burfield v. Duchesse de Pienne*, 2 *N. R.* 280. *Walford v. Same*, 2 *Esp. N. P. C.* 554.

Where a foreigner wife contracts debt.

The inference from these cases is, that a *feme covert*, a subject, can in no case (banishment and abjuration of the realm only excepted, *Co. Litt.* 133. a.) sue without the name of her husband being joined.

Inference.

In the case of banishment and abjuration above mentioned, it is observed by Sir Edward Coke, that such abjuration is a civil death, and that the "opinion concerning the liability of the wife of a man abjured or banished was not hatched by the Judges in Henry the Fourth's time." But it is further observed, that "banishment for a time, which some call a relegation, is no civil death." And the learned authors of a note on this passage, Note on *Co. Litt.* 209, say, that "for the time the effect is the same to the wife; and, therefore, it is equally necessary that she should have a right to sue alone." See also 1 *T. R.* 8. Lord Mansfield in *Corbett v. Poelnitz*.

Of banishment and abjuration applicable to wife.

Where a woman executes a warrant of attorney, and afterwards marries, the same shall be held thereby revoked. *Anon.* 1 *Sulk.* 399.

Where a woman executes a warrant of attorney, and marries.

If, however, judgment were entered up thereon, so as to be a judgment before marriage, *quare* its validity? *Rich. Pr. B. R.* 325. This point did not appear well settled. But it should seem that now it would be held, that where a woman who had given a warrant of attorney married during the term, and was afterwards taken in execution on a judgment signed as of that term, and there-

fore having relation to the first day of the term, it was holden that she could not be relieved. *Triggs v. Triggs*, *Trin. Vac.* 1815. 1 *Tidd*, 220; and with great reason it is said, that the husband, it should seem, ought to be held liable on this as well as any other debt contracted by her *dum sola*. 4 *East*, 522. *Cooper v. Hunchin*, mentioned also *post*, page 269.

Where the warrant of attorney is executed to her *dum sola*.

Where, however, the warrant of attorney is given to the woman *dum sola*, judgment may, by leave of the court, be entered up by the husband and wife, on affidavit of the marriage. *Marder v. Lee*, 3 *Burr.* 1469.

Where a wife executes a warrant of attorney.

Where a *feme covert* executes a warrant of attorney, and judgment is entered up thereon, the court will not vacate such judgment upon a summary application; but leave the parties to their writ of error. *Maclean v. Douglass*, 3 *B. & P.* 128. *Wilkins v. Wetherill*, *id.* 220. See, however, *Reed v. Jewson*, cited by Buller, J. 4 *T. R.* 362. But a *feme* cannot make an attorney as demandant in a writ of right. *Oulds and Others v. Sansom*, 3 *T. R.* 261.

Where a warrant of attorney and judgment thereon given by a *feme*, being a sole trader, was set aside at the instance of her assignees, the husband consenting, which consent formed part of the rule, the judgment being entered up without authority; yet K. B. discharged a *feme covert*, living apart from her husband with a separate maintenance, on summary application, but it appeared that the plaintiff knew her to be under coverture. *Wardell v. Gooch*, 7 *East*, 582.

Where husband left wife in house.

Where the wife committed adultery, and her husband left her in his house with two children, without providing a separate maintenance for her, and the plaintiff being wholly ignorant of the circumstances under which she was living, the husband was held liable for necessities. *Norton v. Fagan*, 1 *B. & P.* 226.

Where on the separation of husband and wife, the husband by deed absolutely transfers to trustees for his wife certain personal property, no longer to be liable to his interference, in an action against the husband for a debt subsequently contracted by his wife, the defendant must shew that the trustees gave effect to the deed by taking possession. *Burrett v. Booty*, 8 *Taunt.* 343.

Where suit will survive, wife must be joined.

It is assumed as a general rule, that wherever a suit will survive, the wife must join in the action. *Dunstan and his Wife v. Burwell*, 1 *Wils.* 224.

Where debt is due to wife *dum sola*.

It is said, that where a debt is due to a wife *dum sola*, the husband and wife must join in an action to recover it. *Moor.* 422. See also *Rumsey v. George*, 1 *M. & S.* 176; and the principle of the propriety of the husband's joining in an action to recover property vested in him in right of his wife, is insisted on in the case of *Beadles v. Sherman*, *Cro. Eliz.* 613; and in an action accruing to him for the labour of his wife, she may well be joined, but not for materials which he found, though incidental to that labour. *Holmes and Wife v. Wood*, mentioned 2 *Wils.* 424; see also the case of the *Dippers of Tunbridge Wells*, *id.* 414.

Where action accrues from labour of wife.

Observation.

It is not indispensable that the name of the wife should be joined in such cases; for where a bond was given to the

husband and wife administratrix of *A. B.*, it was ruled that the husband alone might bring the action. *Ankerstein v. Clark*, 4 *T. R.* 616, and the cases there cited, particularly *Beaver v. Lane*, 2 *Mod.* 217, but it was said in *Rose v. Bowler*, 1 *H. Bl.* 109, that where the wife is the meritorious cause of action, there she may join with the husband, but not otherwise.

Where a bill of exchange was payable to a *feme sole*, who intermarried before the same was due, it was holden that the husband might sue in his own name without joining the wife, although the latter had not indorsed the bill. 1 *B. & A.* 218.

Where a lease was stated in the declaration to be made by the plaintiff on the one part, *T. R.* on the other, but turned out on evidence to have been made by the plaintiff and his wife on the one part, and *T. R.* on the other; held, (*Dallas, C. J. absente*) that this was no variance. *Arnold v. Revoult*, 1 *B. & B.* 443.

It has lately been ruled, that husband and wife may sue on a promissory note made to the wife during coverture. *Philliskirk and Wife v. Pluckwell*, 2 *M. & S.* 393.

The husband cannot be sued alone for the debt of his wife contracted before marriage. *Mitchinson v. Hewson*, 7 *T. R.* 348.

After interlocutory judgment against a *feme* upon a contract, she marries, and being taken in execution, it was held regular, although the plaintiff had notice of the marriage; but Lord Ellenborough, *C. J.* said, "whether the husband can bring error or not, is another question." *Cooper v. Hunchin*, 4 *East*, 521.

Where husband and wife were rendered in discharge of their bail, the wife was discharged on motion; but it would have been otherwise, had they been in custody on execution. *Anon.* 3 *Wils.* 124.

It seems, that if a married woman be taken in execution for a debt contracted by her before marriage, she cannot be discharged, although the husband be in custody on mesne process in the same suit. At all events the application for granting or refusing such discharge is in the discretion of the court. *Chalk v. Deacon and Wife*, 6 *J. B. Moore*, 129.

Nor where a married woman who with her husband is in execution for a debt contracted by her before coverture, is she entitled to be discharged under the Insolvent Act, she not being capable of executing a warrant of attorney, and complying with the other terms required by stat. 1 *G. IV. c.* 119. s. 25. *Ex parte Deacon*, 5 *B. & A.* 759.

A wife may be charged in trespass jointly with her husband. *White v. Eldridge and Wife*, 1 *Ld. Raym.* 443.

Where an action was brought against *A. and B. and C.* his wife, upon a joint promissory note made by *A. and C.* before her marriage, and defendants pleaded the statute of limitations, whereupon issue was joined: Held that an acknowledgment of the note by *A.* within six years, but after the intermarriage of *B. and C.* was not evidence to support the issue. *Pittam v. Foster and Others*, 1 *B. & C.* 248.

Husband and wife lived separate, under a deed, by which he stipulated that his wife should enjoy, as her separate and distinct property, all effects, &c. which she might acquire, or which by any gift, grant, &c. or representation, she or he, in her right, might be

Where husband cannot be sued alone.

Where wife marries after interlocutory judgment.

Where husband and wife were rendered, wife was discharged.

Trespass lies against wife jointly with her husband.

BARON AND FEME; CASES. BILL OF EXCEPTIONS.

entitled to; and that he would not do any act to impede the operation of that deed, but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering such real and personal estates; and the wife having, as executrix of R. M., commenced an action on a promissory note against defendants in the names of her husband and herself, the husband released the debt, which release was pleaded *puis darrein continuance*. The court on application ordered such plea to be taken off the record, and the release to be given up to be cancelled. *Innell and Wife v. Newman*, 4 B. & A. 419.

See titles ABATEMENT, AFFIDAVIT, ARREST, FEME, FINE, JUDGMENT, SCIRE FACIAS, &c.

BARRISTER. See title ARREST, *ante*, page 91, in the Table.

BATH, City of.

Court of requests.

Mentioned for the purpose of noticing, that by stat. 45 G. III. c. 67. the jurisdiction of the court of requests extends to sums not exceeding 10*l*.

Exception in a general act of parliament in favour of the Bath Hospital.

In s. 6. of the statute 13 G. II. c. 19. (called the Racing Act) by no means a local act, is a remarkable exception as to the appropriation of one moiety of the penalties incurred by breach of this act in Somersetshire; namely, that instead of such moiety going to the poor of the parish where the penalty was incurred, it is to be applied to the use of the poor persons admitted into the Bath Hospital.

BATTEL. By stat. 59 G. III. c. 46. s. 2. no tenant received to wage battel, nor trial had by battel, in writ of right. See title RIGHT, WRIT OF RIGHT, *post*.

BERWICK-UPON-TWEED. Process to be executed in this place is to be directed to the mayor and bailiffs of our borough of Berwick-upon-Tweed.

See titles TRIAL, VENIRE, VENUE.

BILL.

What.

The ancient form of proceeding in K. B.; but the filing of a bill in the first instance has long become obsolete, except in particular instances, as against privileged persons, &c.

See titles MEMBER OF PARLIAMENT, PEER, PRISONER.

The declaration is nothing more than a copy of the original bill supposed to have been filed, to which the defendant answered personally in court until stat. 13 E. I.; but at that time he was allowed to appoint an attorney. Further observation would be historical, rather than practical. See G. G. P.

BILL, Against an Attorney.

See title ATTORNEY, K. B., sections XVI., XVII., XVIII.; C. P., sections XXII., XXIII., XXIV.

BILL OF COSTS.

See title ATTORNEY, sections VII., VIII., IX., X., XI.

BILL OF EXCEPTIONS.

Statute, 13 E. I. c. 31.

Where on trial any thing alleged on behalf of either party is overruled by the Judge, the stat. Westminster 2. 13 E. I. c. 31. enacts,

that "when one impleaded before any of the justices alleges an exception; praying they will allow it; and if they will not, if he that alleges the exception writes the same, and requires that the justices will put to their seals for a witness (*in testimonium*) the justices shall so do, and if one will not, another of the company (*de societate*) shall; and if upon complaint made of the justice the king cause the record to come before him, and the exception be not found in the roll, and the plaintiff shew the written exception with the seal of the justice thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal, the judgment shall be proceeded to according to the exception, as it ought to be allowed or disallowed*".

The practice of granting new trials has very much limited the frequency of tendering bills of exception; yet as it is by no means become an obsolete practice, some cases relative thereto will be subjoined, and also Forms.

The use of bill of exceptions limited.

The above statute extends to all pleas to prayers to be received,oyer of deeds, challenges of jurors, and indeed to all material evidence offered and over-ruled. 2 *Inst.* 427. *Dy.* 231. *pl.* 3. *Sir T. Raym.* 486.

What the statute extends to.

If the judge refuse to sign the bill of exceptions, a writ grounded upon the above statute, commanding him to put his seal according to the form of the statute in such case, &c. may, upon petition to the Lord Chancellor, issue. *Lilly P. R.* 232. If the judge return on this writ that the exceptions mentioned or surmised therein "is not so," an action lies for a false return, which fact will be tried, and if found for the complainant, damages will be given, and upon such recovery a peremptory writ may issue. 2 *Inst.* 427.

Where the judge refuses.

But it appears that this writ does not lie where the exception taken is to an order of a court of law, amending one of its own records. Nor *seem* to any order made upon motion. *Lessee of Lawlor v. Murray, Scho. & Lef.* 75.

A bill of exceptions is in the nature of an appeal, examinable not in the court out of which the record issues for the trial at N. P., but in the next immediate superior court upon a writ of error, after judgment given in the court below; 3 *Bl. Comm.* 372. 648, and the truths of the fact therein mentioned can never again be questioned. *Show. P. C.* 120; and as the matter alleged in the bill of exceptions is only examinable in error, upon the return of the writ of error, the judge is called upon to confess or deny his seal; and if he deny his seal, the plaintiff in error may take issue by writ, the form of which is subjoined, upon that fact. 2 *Inst.* 248.

It is in nature of an appeal examinable in a court of error.

* By the above statute the subject is guarded against the improper influence of the judge from whatever cause arising. By the same statute "justices shall not compel the jurors to say precisely, whether it be disseisin or not, so that they do shew the truth of the deed, and require aid of the justices. But if they of their own head will say, that it is disseisin, their verdict shall be admitted at their own peril." What are we to

infer as to the integrity of some public men, at the time when such a clause was thought necessary? That such a clause would not now be thought expedient, we owe to the amelioration of manners, from the progress of right knowledge, greatly by means of the press. Perhaps the truest measure of civilization is a pure and regular administration of public justice.

Where cannot move in arrest of judgment.

If judgment be reversed.

When to be tendered.

Extends only to civil actions.

The party cannot move any thing in arrest of judgment, on the point on which the bill of exception is allowed. *Dominus Rex and Higgins & al.* 1 *Ventr.* 366.

If the judgment be reversed, a *venire de novo* issues, which in the case of *Bent v. Baker and Another*, 3 *T. R.* 27, was held to be returnable in K. B. although the judgment were in C. P.

Bills of exceptions are to be tendered before a verdict given. *Wright v. Sharp*, 1 *Salk.* 288.

It is said they extend only to civil actions, and not to criminal. *Sir Henry Vane's Case*, 1 *Lev.* 68. and the case cited above from *Ventr.* was an information in the nature of a *quo warranto*, and in 1 *Leon.* 5, it was allowed in an indictment for trespass.

PRACTICAL DIRECTIONS.

The matter of exception must be put in writing, and be signed by the counsel on each side; during the sitting of the court, it is said, and before verdict given in the presence of the judge before whom the cause is tried: then the bill of exceptions must be regularly drawn and tendered to the same judge to be sealed, who being required so to do by writ, goes into court and confesses his seal. See the Form of the writ subjoined. The bill is then tacked to the record, and is from thenceforth to be taken as a part of the same. It appears that if it be not tacked to the record, the whole proceedings previously to the trial must be set out; if tacked to the record, only the proceedings subsequently to the issue joined need be set out.

See *Bull. N. P.* 317.

The practice is to allow time for the more formal draft and settling of the bill of exceptions, and which is afterwards tendered to the judge to be sealed. Gardner v. Bailie, 1 *B. & P.* 32.

And in cases where the writ commanding the judge to put his seal, &c. lies, it ought to be made out by the clerk of the crown, and not by the curiitor; and it should not issue without special order from the person holding the great seal. 1 *Scho. & Lef.* 75.

And on a writ of error from the court of K. B. in Ireland, the proper mode is to send a writ from this country to the chief justice of that court, to take the acknowledgment of the seal of the judge at Nisi Prius. Barry v. Fugent, in error. M. 23 G. III. K. B. 2 *Tidd*, 891.

FORMS.

No. 1.
Bill of exceptions as to the effect of evidence. K. B.

(*Venue*) to wit. Be it remembered, that in the term of ———, in the ——— year of the reign of our sovereign lord George the Fourth, now king of the united kingdom of Great Britain and Ireland, defender of the faith, &c. came ——— by ——— his attorney into the court of our said lord the king, before the king himself, at Westminster, and impleaded ——— in a certain plea of trespass on the case upon promises [or as the plea is] on which the said ——— declared against the said defendant, that ——— (*here copy the declaration and pleadings*) †. And thereupon issue was joined between the said ——— and the said ———. And afterwards, to wit, at the Sittings of Nisi Prius, held at ———, in and for the ——— of ———, on ——— the ——— day of ———, in the ——— year of the reign of our said lord the king, before the Right Honourable Sir Charles Abbott, knight, chief justice of our said lord the king, assigned to hold pleas in the court of our said lord the king, before the king himself, ———, esquire, being

BILL OF EXCEPTIONS; FORMS.

273

associated unto the said chief justice, according to the form of the statute in such case made and provided, the aforesaid issue, so joined between the said parties as aforesaid, came on to be tried by a jury of _____ aforesaid, for that purpose duly impanelled: that is to say, _____ of _____, and _____ of _____, (*here state the names of the jury*) good and lawful men of the said _____, at which day came there, as well the said _____ as the said _____, by their respective attorneys aforesaid: And the jurors of the jury aforesaid, impanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the same issue, and upon the trial of that issue, the counsel learned in the law for the said _____, to maintain and prove the said issue on his part gave in evidence that _____ (*here state the testimony on the part of the plaintiff, together with the testimony on the part of the defendant, then add*) Whereupon the said counsel for the said _____ did then and there insist, before the said chief justice, on behalf of the said _____, that the said testimony so produced on the part of the said _____ as aforesaid, was sufficient, and ought to have been admitted and allowed as decisive evidence, to entitle the said _____ to a verdict, and to bar the said _____ of his action aforesaid; and the said counsel for the said _____ did then and there pray the said chief justice to admit and allow the said testimony, so produced on the part of the said _____, to be conclusive evidence on behalf of the said _____, to entitle him to a verdict in this cause, and to bar the said _____ of his action aforesaid: But to this the counsel learned in the law of the said _____, did then and there insist before the said chief justice, that the said testimony was not sufficient, nor ought to be admitted or allowed to entitle the said _____ to a verdict in the said action, or to bar the said _____ of his action aforesaid; and the said chief justice did then and there declare and deliver his opinion to the jury aforesaid, that the said testimony so produced and given on the part of the said _____, was not upon the whole case sufficient to bar the said _____ of his action aforesaid, and with that direction the said chief justice left the issue to the said jury, and the jury aforesaid then and there gave their verdict for the said _____, and £_____ damages; whereupon the said counsel for the said _____ did then and there, on the behalf of the said _____, except to the aforesaid opinion of said chief justice, and insisted on the said several matters as an absolute bar to the said action: And inasmuch as the said testimony, so produced and given on the part of the said _____, and by his counsel aforesaid, objected and insisted on as a bar to the action aforesaid, doth not appear by the record of the verdict aforesaid; the said counsel for the said _____ then and there * proposed the aforesaid objection, alleged by his said counsel, to the opinion of the said chief justice, and requested him to put his seal to this bill of exception, containing the said testimony so produced on the part of the said _____ as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said chief justice, at the request of the said counsel for the said _____, did put his seal to this bill of exception, pursuant to the aforesaid statute in such case made and provided, on the said _____ day of _____, in the _____ year of the reign of his present majesty.

(*Begin as in the last, and copy down to † mutatis mutandis*): And thereupon issue was joined between the said _____ and the said _____, and afterwards, to wit, at the sittings of

The like to be
tacked to a re-
cord where the

judge excused a witness to answering a question affecting his reputation. C. P.

Nisi Prius, held at _____, in and for the county of _____, on _____, the _____ day of _____, in the _____ year of the reign of our lord the now king, before _____, chief justice of our said lord the king of the Bench, assigned to hold pleas in the court of our said lord the king of the Bench, _____ being associated unto the said chief justice, according to the form of the statute in such case made and provided, came on to be tried by a jury of the said county of _____, for that purpose duly impannelled. At which day came there, as well the said _____ as the said _____, by their respective attorneys aforesaid, and the jurors of the jury aforesaid impannelled to try the said issue, being called also came, and were then and there in due manner chosen and sworn to try the same issue: And upon the trial of that issue, one _____ was produced, and by the counsel learned in the law examined upon oath as a witness for the said _____ in support of the said action; and upon the cross-examination of the said _____ by the counsel learned in the law for the said _____, the said _____ was asked by the counsel last-mentioned, whether he had not been imprisoned upon a conviction for counterfeiting the copper coin of this realm: Whereupon the said chief justice, immediately and before the said _____ had answered the said question, declared and delivered his opinion that the said _____ was not bound to answer the said question, and the said _____ thereupon then and there refused to answer the same: And afterwards, at the said trial, the said chief justice, in stating the evidence given in the said cause to the jury aforesaid, did further declare and deliver his opinion to the said jury, that the refusal of the said _____ to answer the said question cast no discredit upon the said _____, and the jury aforesaid then and there gave their verdict for the said _____, and £_____ damages: Whereupon the said counsel for the said _____ then and there on behalf of the said _____, excepted to the aforesaid opinion of the said chief justice, and insisted that the said _____ ought to have answered the said question, and that his refusal to answer the same was and ought to be considered by the said jury as casting a discredit upon him: And inasmuch as the matter hereinbefore mentioned doth not appear by the record of the verdict aforesaid, the said counsel for the said _____ then and there (*go on from the asterisk * in the last precedent.*)

No. 2.
The writ.
C. P.

George the Fourth, &c. To our trusty and well-beloved _____, our chief justice of the Bench, greeting: Whereas we have lately been informed that in the record and process, and also in giving of judgment in a plaint which was in our court before you and your associates, our justices of the said Bench, by our writ, between _____ and _____, and _____ and _____, in a plea of trespass, assault, and imprisonment, manifest error hath intervened, to the great damage of the said _____ and _____, which said record and process, for the error aforesaid, we have caused to be brought into our court before us, and now on the behalf of the said _____ and _____, we are informed in our said court before us, that at the trial of the issue first joined between the said parties in the plea aforesaid, the counsel learned in the law of the said _____ and _____, alleged on their behalf certain exceptions to the opinion then declared and given by you, and that the said exceptions were then and there written in a certain bill, to which you put your seal at the request of the said _____ and _____, according to the form of the statute in such case made and provided; and the

said ——— and ——— have brought into our court before us the said bill with your seal put to the same, as it is said; whereupon the said ——— and ——— have besought us to do what further should seem meet to be done in this behalf, according to the form of the said statute; and forasmuch as by the said statute it is ordained that in such case the justice, whose seal should be put to such exceptions, be commanded to *appear* before us at a certain day, to *confess* or *deny* his seal; therefore we command you that you personally appear before us on ———, (*a general return day*) wheresoever we shall then be in England, to *confess or deny the seal* so put to the said bill of exceptions as aforesaid, to be your seal, according to the form and effect of the said statute, and that you bring with you at the same time this writ.

Witness, Sir Charles Abbott, knight, at Westminster, the ——— day of ———, in the ——— year of our reign.

BILL OF EXCHANGE AND PROMISSORY NOTE.

Observation.

See title COMPUTE, RULE TO COMPUTE.

Several points relating to this instrument, and to promissory note, are of practical import, independently of those points which are more properly matter of law and of pleading than of practice.

For the affidavit of the debt on this instrument, and on promissory note, see title AFFIDAVIT, FORMS.

Of the affidavit of debt.

An objection was taken to the number of separate counts on a banker's several (235) pound notes, but the court refused to strike out any of the counts, Lord Ellenborough, C. J. saying, "I should have drawn this declaration in the same form; the plaintiff ought not to be put to any unnecessary difficulty in his proof." *Lane v. Smith*, 3 *Smith*, 113.

Counts in the declaration.

If the acceptor apply to stay proceedings, he must pay the costs incurred in the actions brought against all parties on a bill of exchange; where the drawer or indorser apply, the application is granted on payment of the debt on the bill of exchange, and costs as against themselves only; but the court said, that the acceptor being the original defaulter, all costs occasioned by his default were recoverable against him. *Smith v. Woodcock*, *Same v. Dudley*, 4 *T. R.* 691; see also *Windham v. Wither*, *Idem v. Trull*, 1 *Str.* 515. So by parity of reasoning, maker of notes liable to all costs. But the sheriff is only liable for the particular costs of the party sued, and as to whom the sheriff is in contempt. See *The King v. Sheriffs of London*, 2 *B. & A.* 192.

Of the different liabilities of the parties sued on bill or note to costs.

A writ of inquiry to assess damages on a bill of exchange or promissory note, (except for foreign money; *Mannsel v. Lord Massarene*, 5 *T. R.* 87,) is unnecessary; since the practice is to obtain a reference to the master or prothonotary by motion in term time, or by summons in vacation, to compute what is due for principal and interest, and for exchange and re-exchange; and for this sum, when ascertained, execution is awarded.

Writ of inquiry unnecessary.

And where a copy is verified by affidavit, and that the original bill is lost, the computation may be made upon the copy. *Brown v. Messiter*, 3 *M. & S.* 281. But it is necessary that notice be given to the defendant of the prothonotary's appointment to compute principal and interest on a bill of exchange. *Branning v. Patterson*, 4 *Taunt.* 487.

Where *nolle prosequi* should be entered.

Where this mode is adopted, it seems necessary that the plaintiff should previously enter a *nolle prosequi* on the money counts. *Heald v. Johnson*, 2 *Smith*, 46. n.; and where the interlocutory judgment was signed and the plaintiff died on a subsequent day of the term, the court granted a rule to compute, observing that the final judgment would relate to the first day of term, and that the defendant could not be injured, since a *sci. fa.* would still be necessary previously to execution. *Benger v. Green*, 1 *M. & S.* 229. It also seems that the rule to compute may be obtained on the day on which interlocutory judgment for want of a plea is signed. *Pocock v. Carpenter*, 3 *M. & S.* 109. Any good cause may be alleged against such reference. *Goldsmid v. Tait*, 2 *B. & P.* 55.

So irregularity previously to the judgment can be shewn as cause against referring the note to the prothonotary. *Pell v. Brown*, 1 *B. & P.* 369.

And it is not a valid objection on shewing cause that a rule to compute was moved on the day of signing interlocutory judgment for not bringing in the record. *Russen v. Hayward*, 5 *B. & A.* 752.

A copy of a bill of exchange or note may be demanded by summons, and proceedings will be stayed till given. *Barry v. Alexander*, *M.* 25 *G.* III. *K. B.* 1 *Tidd*, 610.

The venue cannot be changed in an action brought on these instruments, stated *arguendo* in *Pinkney v. Collins*, 1 *T. R.* 571; this point is mentioned in *Whitburn v. Staines*, 2 *B. & P.* 355, as having been ruled in the case of *Pinkney v. Collins*; but that was a case of change of venue in libel, and the point in question was mentioned only incidentally.

On the execution of a writ of inquiry, it is sufficient to produce these instruments, without otherwise proving them. *Green v. Hearne*, 3 *T. R.* 301.

Before evidence can be given of a bill of exchange being in the defendant's possession, in order to maintain trover, notice to produce it must be proved to have been given to the defendant. *Cowan v. Abrahams*, 1 *Esp. N. P. R.* 50.

The mere notice that the plaintiff will, on the trial, be called upon to prove the consideration, for which a note was given is not sufficient to put the plaintiff upon such proof. The defendant must first fasten some suspicion upon the plaintiff's title, by shewing that the bill or note was obtained from the defendant or some previous holder, by force or by fraud. *Reynolds v. Chettle*, 2 *Campb. C. N. P.* 596.

FORMS.

No. 1.

[Court.]

(Title cause.)

Notice to produce bill or note in trover.

Take notice, that the above-named defendant will, on the trial of this cause, be required to produce and shew to the court the bill of exchange mentioned in the pleading herein, to wit, a bill of exchange dated _____, drawn by the said _____, the above-named plaintiff in this cause, whereby he required one _____ to pay, _____ months after the date hereof, to the order of the said _____, (the plaintiff) the sum of £_____, value received; for if trover be for a promissory note, say "the promissory note mentioned

Copy of bill or note may be demanded.

Venue cannot be changed.

Production of affidavits on execution of inquiry.

In trover for bill, &c. notice to produce must be proved.

Where notice as to consideration for bill or note expedient.

BILL OF MIDDLESEX; *Its Origin.*

277

in the pleadings herein, to wit, a promissory note dated the _____ day of _____, 182—, whereby one _____ promised to pay _____ months after the date hereof to the said _____, the above-named plaintiff in this cause, the sum of £_____, value received.]

Your's, &c.

Attorney for the plaintiff above-named.

To Mr. _____, attorney for the
defendant above-named.

Note. The form must properly describe the instrument sought to be recovered.

[*Court.*]

(*Title cause.*)

No. 2.

Take notice, that the above-named plaintiff in this cause will, on the trial thereof, be required to shew the consideration paid by him for or in respect of the bill of exchange [or note] mentioned in the pleadings, and in question in this cause. Dated this _____ day of _____, 182—, Notice requiring consideration to be proved.

Your's, &c.

Attorney for the above-named defendant.

To Mr. _____, attorney for the
above-named plaintiff.

BILL AGAINST MEMBER OF PARLIAMENT.

See title MEMBER OF PARLIAMENT.

BILL AGAINST A PEER. See title PEER.

BILL OF MIDDLESEX. See title PROCESS.

A writ (or precept, not a writ, 2 *Str.* 1069) proper to the court What. of K. B. previously to the issuing of which, it was always the practice formerly to exhibit a plaint of *quare clausum fregit*, and which was entered of record in that court.

It is a kind of *capias* directed to the sheriff of that county (Middlesex) and commanding him to take the defendant, and have him before our lord the king at Westminster, on a day fixed, to answer to the plaintiff of a *plea of trespass*. 3 *Com.* 285.

"For this accusation of trespass it is that gives the court of Its origin. K. B. jurisdiction in other civil causes; since when once the defendant is taken into custody of the marshal for the supposed trespass, he, being then a prisoner of that court, may there be prosecuted for any other species of injury;" but it is added, that "it is not necessary that the defendant be actually the marshal's prisoner; for as soon as he appears, or puts in bail to the process, he is deemed by so doing, to be in such custody of the marshal as will give the courts jurisdiction to proceed. And upon these accounts in the bill or process, a complaint of trespass is always suggested, whatever else may be the real cause of action." *Ibid.*

After some further illustration, not entirely practical, but rather historical, of its nature, it is further observed, that "in K. B. if the defendant live in Middlesex, the process must still be by bill of Middlesex only."

It is said, that a bill of Middlesex or a *latitat* may be sued out, When may be issued. but not acted upon, before the cause of action accrued, 1 *Crompt.* 25, who cites *Pract. B. R.* 77.

When returnable.

Several authorities may be cited to shew that this writ cannot be made returnable the same day it is issued. *Green v. Rivet*, 2 *Ld. Raym.* 772. But to issue this writ on the return day is now the practice. *Oxlade v. Davidson*, 4 *T. R.* 610; and that it may be served any time on the return day. *Maud v. Barnard*, 2 *Burr.* 812.

When may be served.

The *alias* and the *pluries* must accord with the first writ. *Corbett v. Bates*, 3 *T. R.* 660.

Subsequent writs must agree with the first.

Proper to Middlesex.

If doubt exists as to boundaries.

This writ is proper to K. B. and also to Middlesex, and cannot be served or executed elsewhere. *Borman v. Bellamy*, 1 *T. R.* 187. *Devenege v. Dalby*, 1 *Doug.* 384; but if there be a doubt as to whether the place where it was served be out of Middlesex or not, the service will be deemed good. *Drew v. Marriott*, 1 *Wils.* 77; but in this case it also appeared by affidavit, that the defendant had promised to appear to any writ that might be sued out; still the reason of the thing seems to be the best ground of the decision, for otherwise no writ could be executed in unsettled boundaries.

Not tested.

It has no *teste*.

What number of defendants, &c. where not bailable, may be inserted.

Four defendants for the same, or for different causes of action, may be inserted in this writ, provided it be not bailable. *Yardley v. Burgess*, 4 *T. R.* 697. n.

See titles PROCESS. SERVICE.

PRACTICAL DIRECTIONS.

Where bill of Middlesex not bailable.

The precept, FORMS, No. 1, or 2, must be made out, and then the precept, which may always be had at the stationers in blank; see FORM, No. 3, subjoined. Indorse the attorney's name, and if sued out by him, also the agent's, with the date of suing out the process; carry precept to the Bill of Middlesex Office in Clifford's Inn; pay signing, 6d. in term time, 10d. in vacation; copy and serve same personally on the defendant; the copies in blank are also sold at the stationers.

Where it is.

Where defendant is to be held to bail, the PRACTICAL DIRECTIONS are the same, except that an affidavit of the debt must be made and filed; the affidavit is usually made by the plaintiff at the Office in Clifford's Inn. See title AFFIDAVIT, FORMS. Also an AC ETIAM, see FORMS, must be inserted in this precept when bailable, somewhat different from the more general ac etiam, viz. instead of saying as in the writ of latitat, according to the "custom of our court, before us," say, "according to the custom of the court of the said lord the king, before the king himself." See FORM, No. 4.

Also in addition to the attorney and agent's name, and date, indorse the sum sworn to.

Alias and pluries, how formed.

In case of more precepts than one issuing, the second is called an alias, see title ALIAS; the next and subsequent writs are called pluries; pay signing each 2d. An alias bill of Middlesex is made by adding after the words "The sheriff is commanded" the following words, "as before he was commanded." The pluries bill of Middlesex is made by adding after the words "The sheriff is commanded" the following words "as oftentimes he has been commanded."

Let precept accord with nature of the writ.

Care should also be taken to signify the fact of the writ being an alias or a pluries in the precept, and which is done by prefixing one of

BOARD OF GREEN CLOTH; *Of the King's Household.*

279

these words, as the case may be. And it should seem, that if a term be allowed to pass over without renewal, a new writ must be issued. Such is the practice as to a latitat, grounded on the rule that the teste of an alias must be the return of the preceding writ. See Touchin's case, 2 Salk. 690.

FORMS.

Middlesex, to wit. Bill for _____ against _____ returnable on _____

No. 1.

Precept for a bill of Middlesex not bailable.

Attorney.
(Date.)

Middlesex, to wit. Bill for _____ against _____ case for £_____ upon promises (as the case may be) returnable on _____

No. 2.

Precept where writ is bailable.

Attorney.
(Date.)

Oath for £_____
per affidavit filed.

Middlesex, to wit. The sheriff is commanded to take _____ and John Doe (*this is a nominal defendant, inserted for the sake of grammatical concordance, as the writ is made out in the plural number, and is unnecessary where there is another defendant*) if they may be found in his bailiwick, and safely keep them, so that he may have their bodies before the lord the king at Westminster, on _____ to answer _____ in a plea of trespass, and that the said sheriff have there then this precept.

No. 3.

Bill of Middlesex not bailable.

By bill. Ellenborough and Markham.

Indorse attorney's name and date.

Mr. _____ you are served with this process to the intent that you may by your attorney appear in his majesty's Court of King's Bench, at the return thereof, being the _____ (*in words at length*) day of _____, 182— (*need not be in words at length*) in order to your defence in this action.

Middlesex, to wit. The sheriff is commanded to take _____ and John Doe, if they shall be found in his bailiwick, and them safely keep, so that he may have their bodies before the lord the king at Westminster, on _____ (*the return*) to answer _____ in a plea of trespass; and also to a bill of the said _____ (*the plaintiff*) to be exhibited against the said _____ (*the defendant*) for £_____ (*any nominal sum, usually double the amount of the debt sworn to. Imp. 163, n.*) upon promises, according to the custom of the court of the said lord the king, before the king himself, and that he have there then this precept.

No. 4.

Bailable bill of Middlesex.

Ac etiam.

By bill. Ellenborough and Markham.

Indorse the attorney or agent's
name and residence, date,
and sum sworn to.

BILL OF PARTICULARS. See title PARTICULARS.

BILL AGAINST PRISONER. See title PRISONER.

BLACK ACT. See title HUNDREDORS.

BOARD OF GREEN CLOTH; *Of the King's Household.*

It is mentioned here, on account of persons resident within the verge of the king's royal palace being privileged from arrest, except

BODY, Rule to bring in the Body; BOND.

by an order of this board, or under process issuing out of the palace court. See *Tidd*, 210.

BODY; Rule to bring in the Body. See titles **ATTACHMENT AGAINST SHERIFF. BAIL, Above.**

Where on the return of *cepi corpus* the plaintiff brought an action against the sheriff for an escape, and recovered damages: Held, that he could not afterwards rule the sheriff to bring in the body with a view to proceed in the original action for costs. *Rex v. Middlesex, (Sheriff)* 1 *Chit. R.* 393.

In the Exchequer the rule to bring in the body may be taken out on the day immediately after the sheriff returned the writ, if the time for putting in bail is then expired. *Gore v. Williams*, 3 *Anstr.* 659.

The rule on the sheriff to return the writ expired two days after the end of the term, a rule to bring in the body taken out next day, but tested on the last day of term, was held regular. *Buckler v. Blythe*, 3 *Anstr.* 779.

BONA NOTABILIA. A term in ecclesiastical law, but adopted in practice in relation to changing the *venue*; it being said that actions respecting *bona notabilia* will not admit of the *venue* being changed. Bonds, specialties, bills of exchange, and promissory notes, are held to be *bona notabilia*. See title **VENUE**.

BOND. See also titles **BAIL BOND. BREACHES; Suggestion of Breaches under the Statute.**

Where an action is commenced for a penalty on a bond of indemnity, *Brangwin v. Perrott*, 2 *Bl. R.* 1190, *Wilde v. Clarkson*, 6 *T. R.* 303, or for performance of covenants, *Tidd*, 558; proceedings will be stayed on the payment of the penalty with costs; but where by the condition of the bond money is to be accounted for, it may seem that more may be recovered than the penalty, and therefore even upon payment of the penalty and costs, the court refused to stay proceedings. *Lord Lonsdale v. Church*, 2 *T. R.* 388.

Upon a bond in a penalty conditioned for paying a less sum by instalments and interest, though a part only of the instalments are due, the obligee may arrest for the aggregate amount of all the instalments, and the interest accrued due before the action brought. *Talbot v. Hodson*, 7 *Taunt.* 251.

Bond conditioned for the payment of a principal sum in the year 1820, with interest in the mean time half yearly; an action having been brought for the penalty upon breach of the condition in non-payment of half a year's interest on the 29th September, 1817, the court refused to stay the proceedings before judgment on payment of the interest due and costs, although the non-payment of the interest was owing to a slip. *Van Sandan v. ———*, one, &c. 1 *B. & A.* 214.

A member of parliament had given a bond with two sureties, conditioned for the payment of the sum to be recovered in the action pursuant to stat. 4 *G. III. c.* 33. and before trial became bankrupt, the court refused to order the bond to be cancelled. *Hunter v. Campbell, M. P.*, 3 *B. & A.* 273.

Debt on bond given to plaintiff as treasurer of a friendly society;

plea, that the rules of the society had not been confirmed at the quarter sessions pursuant to stat. 33 G. III. c. 54: Held, upon demurrer that the plea was bad, the bond being a good bond at common law. *Jones v. Woollam*, 5 B. & A. 769.

The defendant may refer it to the prothonotary before judgment, to ascertain what is due for principal and interest on a common money bond. *Bosworth v. Bosworth*, 3 J. B. Moore, 590.

If default be made in payment of the interest on a bond, the principal whereof is not yet due, the court will not stay proceedings on payment of the interests and costs. *Tighe v. Crafter*, 2 Taunt. 387. but *semble*, they would restrain the execution to the interest and costs.

BOOK. See titles DEMURRER, PAPER BOOK.

BOOKS, ROLLS, &c. *Inspection of*.

A motion, may be made for a rule to shew cause why the party Where granted. whether plaintiff or defendant should not be permitted or be at liberty to inspect books, rolls, &c. The motion is grounded on an affidavit of facts, and particularly that inspection has been applied for, and refused. *Roe and Hare, bart. v. Aylman*, Bar. 236. *Hodges v. Atkis*, 3 Wils. 398. and it must also appear that such inspection is necessary, issue being joined. *S. C. Dr. Groenvelt v. Dr. Burrell*, 1 Ld. Raym. 252. *Carth.* 421.

If one part of the deed be executed by the plaintiff alone, but remains in the possession of the defendant's attorney, the court of C. P. will order the latter to give an inspection and copy of it to the plaintiff, and the affidavit for such inspection need not set out the plaintiff's cause of action. *Morrow v. Saunders*, 3 J. B. Moore, 671.

So where the plaintiff entered into a contract with an auctioneer for the purchase of land by auction, and made a deposit in part of the purchase money, and afterwards brought an action against the defendants (the vendors) for interest, for not completing the purchase according to the conditions of sale: Held, that the latter must produce such contract for the purpose of the plaintiffs' inspecting it, or getting it stamped. *Gigner v. Bayly*, 5 J. B. Moore, 71.

And a *mandamus* to burgesses, &c. to inspect the corporation books will be granted, but *semble*, there is no general right in every person to inspect the books of quarter sessions. *Rex v. Chester, (Sheriff)* 1 Chit. R. 476.

So the books of the commissioners of the lottery and their numerical lists are of a public nature, and are kept by the commissioners in trust for the ticket holders, who are entitled to an inspection of them by a rule of court. *Schinotti v. Bumstead and others*, H. 36 G. III. K. B. 1 Tidd, 617.

But this rule cannot be granted where the books are of a private nature; nor, under the statute 32 G. III. c. 58. does a town clerk incur a penalty for refusing an inspection of an order for admission of a burgess. *Davies v. Humphreys*, 3 M. & S. 223. and inspection was refused to plaintiff in replevin of a deed to which he was no party, assigning to the avowant the reduction of the demised premises. *Brown v. Rose*, 6 Taunt. 283. So also where one of two parts of an indenture interchangeably executed is lost, Where not.

BOOKS; BREACHES, *Suggestion under the Statute.*

the court will not order an inspection of the other. *Street v. Brown*, 6 *Tunst.* 302.

And if one part of an indenture of apprenticeship be executed by the plaintiff and the defendant, and sworn to be in possession of the latter: Held, on a notice given by the plaintiff to produce it, that an affidavit of the defendant, that he had not such indenture in his possession, and that he had not divested himself of it, nor destroyed it, and that he did not know in whose possession it was, or what had become of it, was insufficient, for that he should have stated that it never existed, that he had never possessed it, or that he had not been enabled to find it. *Cooke v. Tanswell*, 1 *J. B. Moore*, 465.

Nor will the court compel a vestry clerk to produce and permit copies to be taken of documents from the parish chest in his custody for any other than parochial purposes, for if he was legally the vestry clerk, he had a right to the custody of these documents, and if not, the person entitled to the office might obtain possession of them by *mandamus*. *May v. Gwynne*, 4 *B. & A.* 301.

After an action brought against the Sheriff of Chester for not levying under a writ issued out of the Court of Great Session, the court refused to grant a rule for the sheriff to give the plaintiff inspection of the writ in order to frame the declaration, although the writ was in the sheriff's possession. *Rex v. Chester*, (Sheriff) 1 *Chit. R.* 476.

BOOKS. *Evidence of Books, Rolls, &c. Evidence of Rolls, see title EVIDENCE, and table subjoined.*

BOTTOMREE-BOND.

The court refused a rule of reference to the master to compute what was due on a bottomree bond. *Palin v. Nicholson*, *E.* 38 *G. III.* 1 *Tidd*, 589.

In error brought on judgment on a bottomree bond, it is necessary to put in bail. *Pitt v. Coney*, 1 *Str.* 476, cited 7 *T. R.* 450. n.

BREACHES. *Suggestion of Breaches under Statute 8 & 9 W. III. c. 11. s. 8.*

Observation.

The practice is compulsory according to the statute. *Drage v. Brand*, 2 *Wils.* 377. and every day afford cases where it ought to be adopted.

The statute 8 & 9 *W. III. c. 11. s. 8.* enacts, that in all actions which shall be commenced or prosecuted in any of his majesty's courts of record, upon any bond or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff may assign as many breaches as he may think fit; and the jury, upon trial of such action, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff, upon the trial of the issues, shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nilhil dicit*, the plaintiff,

upon the roll, may suggest as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize or *nisi prius* of that county, to inquire of the truth of every one of those breaches, and to assess the damages the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices, or justice of assize or *nisi prius*, that he or they shall make a return thereof to the court from whence the same shall issue at the time in such writ mentioned; and in case the defendant after such judgment entered, and before any execution executed, shall pay into the court where the action shall be brought, to the use of the plaintiff, or his executors or administrators, such damages, so to be assessed, by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or, if by reason of any execution executed, the plaintiff, or his executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his costs of suit, and all reasonable charges and expences for executing the said execution, the body, lands, or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but, notwithstanding in each case such judgment shall remain, continue, and be as a further security to answer to the plaintiff and his executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained, upon which the plaintiff may have a *scire facias* upon the said judgment against the defendant, or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to shew cause why execution shall not be had upon the said judgment, upon which there shall be the like proceeding as was in the action of debt upon the said bond of obligation, for assessing of damages upon trial of issues joined upon such breaches or inquiry thereof upon a writ, to be awarded in manner as aforesaid. And that upon payment or satisfaction in manner as aforesaid of such future damages, costs, and charges, as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid.

It appears that in cases within this statute, the plaintiff cannot, by default, enter up judgment on the whole penalty on a judgment, as he might have done at common law, without suggesting on the roll the particular breaches of the condition. *Roles v. Rosewell*, 5 T. R. 598. in which case is cited *Hardy v. Bern*, (Exchequer) E. 30 G. III. *ib.* 540. So, after judgment on demurrer in debt, on bond conditioned to pay an annuity, the defendant cannot issue execution for the arrears due, without assigning breaches on the record under the statute. *Walcot v. Goulding*, 8 T. R. 126.

On this occasion several cases were cited to shew that where judgment was signed for the whole penalty, and execution issued for the sum due only, the court formerly exercised an equitable jurisdiction in directing any overplus to be refunded, particularly *Howell v.*

In what cases breaches must be suggested on the roll.

BREACHES, *Suggestion under the Statute*; CASES.

Hanforth, 2 Bl. R. 1016; also Ogilvie v. Foley, *id.* 1111; but the court said that it was established by the case of Collins v. Collins, 2 Burr. 823; (ruled indeed prior to those cases) that a bond, conditioned for the payment of an annuity, was within this statute. See also Ethersey v. Jackson, 8 T. R. 255. where, after plea of *non est factum*, the plaintiff had delivered an issue without assigning breaches, according to the statute; but, previously to trial, and within the time allowed, from the defendant's being under terms to take short notice of trial, had delivered another issue, duly assigning such breaches, without having taken out any summons to amend the former issue, the court held such proceeding irregular, and also that the statute was compulsory.

In debt on bond conditioned for the performance of covenants after oyer and performance of each covenant pleaded specially and also performance pleaded generally, the plaintiff must assign specific breaches in his replication, if not already done in the declaration, and if he merely take issue on the general performance, and enter a separate assignment of breaches on the record no damages can be assessed on them and the court will award a re-pleader. Plomer v. Ross, 5 Taunt. 386. S. C. 1 Marsh. 95.

After a plea *non est factum*, and that the bond was obtained by fraud and covin, where breaches are not assigned in the declaration, the plaintiff may suggest them under the statute 8 & 9 W. III. c. 11. in making up the issue. Homfray and others v. Rigby, 5 M. & S. 60.

So in an action of debt on bond with a penalty for performance of covenants, breaches may be assigned in the replication under statute 8 & 9 W. III. c. 11. s. 8. and on demurrer an interlocutory judgment may be given, and final judgment stayed till after award and execution of a writ of inquiry. Johnes v. Johnes, 3 Dow, 1.

And where the interlocutory judgment was in Easter term, and then as the inquisition could not be taken out pursuant to the statute till after Trinity term, a day was given in Michaelmas term, passing over Trinity term without continuance: Held, that as in the due execution of the object of the statute, the giving a day in Trinity term would have been nugatory, the reason for the continuance failed, and the omission was no error. *Ib.*

But a bond given to the Lord Chancellor by the petitioning creditor of a bankrupt is not within this statute. Smithy v. Edmondson, 3 East, 16. neither is a bail bond, Moody, assignee, &c. v. Pheasant, 2 B. & P. 446. Selby and others, Assignees, &c. v. Serres, E. 41 G. III. 1 Tidd, 604. neither is a warrant of attorney. Kinnersley v. Mussen, 5 Taunt. 264. nor in an action by executors, where the bond was conditioned to be void on payment of a sum certain at a future day, or within one month after the death of the obligee, the plaintiff's testator. Cardoza v. Hardy, 2 J. B. Moore, 220.

Where a plaintiff suggested a breach of a bond conditioned not to assault, molest, or injure the person of the plaintiff in certain terms of the replication mentioned in the case, such terms, though not alleged in formal terms to be laid according to the statute, were held sufficient. See the case of Tombs v. Painter, 13 East, 1.

What bond is not within this statute.

As to adhering to the form prescribed by the statute.

Leave was given to the plaintiff in debt on bond, conditioned to perform an award after judgment for him upon a plea of judgment recovered to execute a writ of inquiry upon the statute 8 & 9 W. III. c. 11. s. 8. after writ of error allowed, and to sign a new judgment on the terms of paying costs, and putting the defendant in *statu quo*, &c. *Hanbury v. Guest*, 14 *East*, 401. and in this case it was admitted that the first judgment, without the inquiry having been executed, would have been unavailable.

Thus far the practice, as it is to be gathered from the few decisions that appear to be reported.

The practice cannot be said to be very generally established: and, as observed above, little is to be found in the more usual books of practice. Even so late as *H. 44 G. III.* Lord Alvanley, in delivering the judgment of the Exchequer Chamber, in the case of *Hankin v. Broomhead*, 3 B. & P. 607. expressed his sorrow "to find that none of the courts have ever been moved as to the proper mode of entering up judgment under the statute of *William*, in cases of this kind." Mr. Serjeant Williams, in a most elaborate and original note, in his edition of Saunders's Reports, has, indeed, supplied this *desideratum* to the profession; and by adopting his great authority, that which was before obscure or difficult even to an experienced practitioner, will be rendered more clear as well as correct. Indeed, certain forms which the learned Serjeant conceived might answer the purpose were, in the case above cited, sanctioned by the opinion of the court, and in the selection of the Forms subjoined I have taken him for a guide.

The practice not very general.

According to the cases, *Collins v. Collins*, 2 *Burr.* 820. and *Goodwin v. Crowle*, 1 *Comp.* 357. the judgment may be entered up as for the whole penalty; but then, it is to stand as a security only for the damages sustained.

Where judgment entered for the whole penalty, it is to stand as a security for the damages.

But where judgment is entered on a warrant of attorney, though there be a bond also, it is not necessary under the statute to suggest breaches. *Austerberg v. Morgan*, 2 *Taunt.* 195. not even where it is conditioned for payment of the money by instalments. *Cox v. Rodbard*, 3 *Taunt.* 74. See also *Tilby v. Best*, 16 *East*, 163. See title SCIRE FACIAS.

Where judgment is signed under a warrant of attorney suggestion not necessary.

PRACTICAL DIRECTIONS.

The judgment being signed as above, the breaches of the condition of the bond, or of the covenants, must be suggested on the roll. Of these suggestions the practice is said to be to deliver a copy to the defendant, or his attorney, and at the same time a notice of executing a writ of inquiry for the sittings or assizes.

Where judgment by default, or on demurrer, is signed.

Several precedents of suggestions will be given in the FORMS subjoined.

A writ of inquiry must then be prepared according to the nature of the case. See FORMS of such writs of inquiry subjoined.

The writ of inquiry being engrossed and delivered to the sheriff, the jury is thereupon summoned, and the jury process, with panel annexed is returned.

Copy the record with the suggestion on paper; leave same with the chief justice or judge at the assizes; attend the execution of the writ; the jury find the damages as usual; a proper return to the

BREACHES, *Suggestion under the Statute*; FORMS.

writ of inquiry is made, and execution for the damages and costs is awarded.

As in other cases of the execution of the writ of inquiry, evidence need not be adduced to prove an instrument set out or admitted in the defendant's plea, by the testimony of the subscribing witness. *Collins v. Rybot*, 1 Esp. C. N. P. 157. but if the action be on a bond, and the defendant let judgment go by default, and the plaintiff thereupon makes his suggestion, in which he sets out the condition of the bond, and if that appears to be for performance of an award, or of covenant in an indenture, &c. the plaintiff must prove the condition of the bond, the award, indenture, or articles, as well as the breaches suggested. *Edwards v. Stone*, coram Lawrence, J. at Hereford Spring Assizes, 1803. Wms. Saund. R. 58. n.; but evidence that the instrument produced is the same as that stated in the suggestion is necessary.

Mr. Serjeant Williams observes, that if the defendant should plead non est factum to a bond, (within the meaning of this statute) the plaintiff may find some difficulty in proceeding under the statute, for it does not seem clear whether, in that case, he is to suggest breaches, or to sue out a scire facias; therefore, to obviate any difficulty, the learned editor proceeds to point out a mode of statement of the bond, and of the indenture containing the covenants, for the due keeping of which such bond may have been given. See 1 Saund. 58. n. 2 Saund. 187. a. n. (1). 4th edit. 1809.

FORMS.

N. The following Form is inserted at length from Williams's Saunders, ubi sup. The practitioner will thence gather how much of a deed it will be necessary to set out on suggesting breaches of the covenants found therein. It will be obvious, that should the suggestion extend to rent in arrear only, the setting out the parcels at length will be unnecessary, but where the suggestion relates to the non-repairing the full description of the premises seems to be indicated.

No. 1.
Suggestion after
final judgment in
debt on a bond
for performance
of covenants.

And now at this day, to wit, on the _____ day of _____ in _____ term, in the _____ year of the reign of our said sovereign lord George the Fourth, come the said bailiffs and citizens of the said city of _____, by the said _____, their attorney, and say that the said writing obligatory, in the said bill of the said bailiffs and citizens, exhibited against the said _____ was under this condition, That if one _____, his executors, administrators, or assigns, did well and truly observe, perform, fulfil, accomplish, pay, and keep all and singular the covenants, grants, articles, clauses, provisoes, payments, conditions, and agreements whatsoever, which, on the part and behalf of the said _____, his heirs, executors, administrators, or assigns, were or ought to be observed, performed, fulfilled, accomplished, paid and kept, comprised or mentioned in one indenture of lease, bearing date with the said writing obligatory, and made, or expressed to be made, between _____ and _____, gentlemen, bailiffs of the said city of _____, and their brethren the citizens of the said city, of the one part, and the said _____, of the other part, in all things, according to the true intent and meaning of the same, then the said writing obligatory was to be void and of none effect, or else should be and remain in full force, power, and virtue: And that the said indenture, in the said condition mentioned, was made on the said _____ day of _____, in the year of our Lord _____, between the said _____ and _____, then bailiffs of the said city of _____, and their brethren the citizens of the said city of the one part, and the said _____, in the said condition mentioned, by the

name of _____, of _____, in the county of _____, _____ of the other part, which other part of the said indenture, sealed with the seal of the said _____, the said bailiffs and citizens of the said city of _____, bring here into court, the date whereof is the same day and year last mentioned, whereby the said _____ and _____, the said bailiffs and their brethren the citizens of the said city, for and in consideration of the rents, covenants, and agreements thereafter mentioned, expressed, and reserved, and on the part and behalf of the said _____, his executors, administrators, and assigns, to be paid, done, and performed, did, with one assent, consent, and agreement, for them and their successors, bailiffs and citizens of the said city, demise, lease, set, and to farm let, unto the said _____, his executors, administrators, and assigns, All those their water corn-mills, set, situate, standing, and being in or near _____, in the said city of _____, called _____, and all houses, buildings, ways, waters, pools, ponds, dams, and flood-gates to the said mills, or any of them belonging, with all and every of their appurtenances, and all and all manner of going and running gear belonging to, and used with the said mills; and also all and all manner of goods and chattels, utensils, implements, and tools whatsoever of them the said bailiffs and citizens then standing, remaining, or being in, at, or belonging to the said mills, and which the then tenants were obliged to leave there, and that little piece of building then lately used as a walk-mill, but then demolished and plucked down, with the land whereon the said building stood: And also all that the piscary or fishing in the Nether Pool, otherwise called _____, adjoining to the said mill, and all that the said pool, called Nether Pool, or _____, as the same was then measured, bounded, and staked out, with liberty also of landing the nets on the waste lands belonging to the said bailiffs and citizens, gained out of the said _____, which were not then in lease to any other persons, and all privileges and advantages to and with the said pool, piscary, and fishing, usually enjoyed: and all houses, out-houses, edifices, buildings, ways, waters, water-courses, pools, ponds, dams, streams, flood-gates, easements, commons, profits, commodities, advantages, hereditaments, and appurtenances whatsoever to the premises aforesaid belonging, or in anywise appertaining or accepted, reputed, deemed, taken or known as part, parcel, or member thereof, with free liberty also to and for the said _____, his executors, administrators, and assigns, to pull down the said mill, and apply the materials thereof, utensils, and geering thereto belonging, as he or they should think proper, he or they erecting or building in the same place another good and substantial mill, with fit and proper wheels and appurtenances, as thereafter mentioned; except and always reserved out of that demise unto the said bailiffs and citizens, their successors and assigns, all such waste grounds or lands gained out of the said pool as were not staked and set out as aforesaid, *To have* and to hold the said mills, pools, fishery, and premises thereby demised, or so intended to be (except before excepted) with their and every of their appurtenances, unto the said _____, his executors, administrators, and assigns, from the _____ day of _____, next ensuing the date of the said indenture, for and during and unto the full end and term of _____ years, from thenceforth next ensuing, fully to be complete and ended, yielding and paying therefore yearly, and every year, during the first six years of the said demised term, unto the said bailiff and citizens, their successors and assigns, the rent or sum of £_____ of lawful money of Great Britain, upon two of the most usual feast days, or days of payment in the year, by even and

BREACHES, *Suggestion under the Statute*; FORMS.

equal portions, without any deduction or abatement whatsoever (except only for the land-tax) and also yielding and paying yearly, and every year, unto the said bailiffs and citizens, their successors and assigns, during the last ——— years of the said demised term, the rent or sum of £———, of like lawful money, upon the same feast days and times of payment, without any deduction or abatement whatsoever (except only the land-tax, which the said bailiffs and citizens were to pay and discharge): *And* the said ——— for himself, his executors, administrators, and assigns and every of them, did covenant, promise, and grant to and with the said bailiffs and citizens, and their successors and assigns, by their said indentures, that he the said ———, his executors, administrators, or assigns, or some of them, should and would yearly, and every year during the said demised term, well and truly pay or cause to be paid unto the said bailiffs and citizens, their successors and assigns, the said yearly reserved rents of £——— and £——— of lawful money of Great Britain, upon the respective days and times, and in manner and form above limited and appointed for payment thereof, without any deduction, defalcation, or abatement whatsoever (except only for the land-tax): *And* also that he the said ———, his executors, administrators, or assigns, should and would, within the space of ——— years from the day of the date of the said indenture, erect and build, or cause to be erected and built, a good set of mills at and upon the same place where the said demised mills then stood, and should and would expend and lay out in building the sum of £——— and should and would make such mills good, firm, and substantial, with proper wheels, gates, utensils, and other appurtenances, fit for carrying on some sort of iron manufactory, and should and would during the said term repair, uphold, maintain, and keep, not only the said mills so to be erected and built, but also the flood-gates, wastes, bridges, and dams, belonging to the said mills and pools, with all needful and necessary preparations, as by the said indenture amongst other things more fully appears: *And* the said bailiffs and citizens of the city of ——— in fact say, that before the feast of ——— in the year of our Lord ——— the said ——— died, that is to say, at London, in the parish of St. Mary le Bow, in the ward of Cheap, and that at the said feast of ——— in that year ——— the sum of £——— of the rent of £——— aforesaid, four years and a half, ending at that feast in that year, were in arrear from the executors of the last will and testament of the said ——— to the said bailiffs and citizens of the said city of ——— *to wit*, at London aforesaid, in the parish and ward aforesaid, and the same still remains due and unpaid, contrary to the form and effect of the said covenant of the said ——— so made in that respect: *And* the said bailiffs and citizens of the said city of ——— further say, that although the said ———, in the said indenture mentioned, within six years next after the making of the said indenture, did erect and build a set of mills at or upon the same place where the said demised mills, at the time of the making the said demise, stood; yet the said ——— did not cause the same to be well built, neither did the said ——— expend or lay out in building the same the sum of £——— nor any sum of money exceeding the sum of £——— nor were the same set of mills made good, firm, and substantial, with wheels, gates, utensils, and other appurtenances, fit for carrying on any sort of iron manufactory: nor did the said ——— in his life-time, or any other person whatsoever, for the space of ——— years now last past, repair, uphold, maintain, or keep the said new erected mills, or any of them, or any of the flood-gates, wastes, bridges,

and dams belonging thereto, and pool, or any of them, but on the contrary thereof permitted and suffered the said mills, and the said flood-gates, wastes, bridges, and dams, to be broken down, ruinous, and in great decay, for want of needful and necessary reparations, and the same still remain broken down, ruinous, and in great decay; that is to say, at London aforesaid, in the parish of St. Mary le Bow, in the ward of Cheap aforesaid, and this the said bailiffs and citizens of the city of ——— are ready to verify, and pray judgment and their damages, by reason of the said breaches of covenant, to be adjudged to them; *therefore*, it is considered by the barons here, that the said bailiffs and citizens ought to recover their damages on occasion of the premises against the said ———; but because it is unknown what damages the said bailiffs and citizens have sustained by reason of the said breaches of covenant, *therefore*, according to the form of the statute in such case lately made and provided, the sheriffs of ——— are commanded that they cause to come before ——— chief baron of the Exchequer of our lord the king, on ——— next after ——— at ———, twelve free and lawful men of their bailiwick, to inquire of the truth of the premises by the said bailiffs and citizens above suggested; and to assess what damages the said bailiffs and citizens have sustained by reason of the breaches of covenant aforesaid, and that they should have on that day before the said chief baron the writ of the said lord the king, to them directed for that purpose. *It is likewise* commanded to the said chief baron that he certify the inquisition before him taken to the barons of the Exchequer at Westminster, from the day of ——— in three weeks next coming, together with that writ; and the same day is given to the said bailiffs and citizens here, &c.

N. The following suggestion was made in the issue as delivered immediately after the replication and issue joined thereon.

"And the said John, for breach of the condition of the said writing obligatory, suggests to the court here, according to the form of the statute in such case made and provided, that the said several bills of exchange, so drawn by the said ——— upon the said Messrs. Baillie, Pocock, and Co. Merchants, in London, were not, nor was any, or either of them, duly paid according to the and effect thereof, and that the third of each set of the said several bills of exchange was duly presented for payment to the said Messrs. Baillie, Pocock, and Co. and being protested for non-payment thereof, was afterwards produced to the said Henry, who then and from thenceforth hath refused to pay the said bills, or any, or either of them, and that the said bills still remain wholly unpaid and unsatisfied;" *therefore*, as well to try the truth of the issues above joined as to inquire the truth of the premises above suggested by the said ———, and to assess what damages he hath sustained by reason of the breach of the said condition above assigned, according to the form of the statute in such case made and provided, the sheriffs are commanded that they cause to come, &c. (*See next precedent.*)

No. 2.

A suggestion of a breach of bond conditioned for payment of bills of exchange by a third person, with an award of venire.

(*Enter the judgment, and then proceed as follows.*) And hereupon the said ———, according to the form of the statute in such case made and provided, says, that the said writing obligatory, whereon the said judgment was so recovered against the said ——— as aforesaid, was made and given by the said ———, under and subject

No. 3.

Suggestion of breach, after judgment by default, with an award of writ of

inquiry in debt
on bond.

to a certain condition thereto subscribed, whereby (if there be a recital in the bond, say "after reciting" then state the recital, and proceed) it was declared that (here recite the condition) and for breach of the said condition of the said writing obligatory, the said _____, according to the form of the statute in such made and provided, suggests and gives the court here to understand and be informed, that (here suggest the breach or breaches), and hereupon the said _____ prays the writ of our said lord the king, to be directed to the sheriff of _____, and to the Right Honourable Sir Charles Abbott, knight, his majesty's chief justice, assigned to hold pleas in the court of our said lord the king, before the king himself, (or if in the country, say, "to his majesty's justices assigned to take the assizes in the county of _____,") commanding the said sheriff that he cause to come before the said chief justice (or "justices of assize") on _____ the _____ day of _____ next, at _____, in the county of _____, twelve, &c. by whom, &c. and who neither, &c. to inquire of the truth of the said breaches above assigned, and to assess the damages thereby sustained by the said _____ and also that it be commanded in the said writ to the said chief justice, (or "justices of assize") that he (or "they") make a return thereof to the said court of our said lord the king, before the king himself, at Westminster, on _____ next after, and it is granted to him, &c.; the same day is given to the said _____, at the same place: At which day, before our lord the king at Westminster, comes the said _____, by his attorney aforesaid, and the said chief justice (or "justices of assize") now here returns (or "return") a certain inquisition indented, taken before him (or "them") at _____, in the county of _____, on _____, the _____ day of _____, in the _____ year of the reign of our said lord the king, upon the oath of twelve good and lawful men of the same county, by which it is found (here recite the inquisition, which is in the nature of a postea), and that the said _____ hath sustained damages by reason of the aforesaid breach of the said condition of the said writing obligatory, to the sum of £_____.

N. This is proposed as a proper form by Mr. Serjeant Williams.

No. 4.

A judgment so as to have the costs of the inquisition, where judgment was for the plaintiff on demurrer.

"Whereupon all and singular the premises being seen, and by the court here more fully understood, and mature deliberation being thereupon had, for that it appears to the court here, that the plea by the said _____, in form aforesaid above pleaded, is not sufficient in law to bar the said _____ from having his said action thereof maintained against the said _____, it is considered that the said _____ ought to recover his said debt, and also his damages by reason of the detention of that debt, and his costs and charges in about his suit in this behalf." "And hereupon the said _____, according to the form of the statute in such case made and provided, says, that (then assign the breaches, and afterwards say) Wherefore, because it is convenient and necessary that the court of our said lord the king now here should not give their final judgment of and upon the premises aforesaid, until such time as the truth of the said breaches of covenant, so suggested by the said plaintiff, shall have been inquired into, and the damages which the said _____ has sustained by reason of those breaches shall have been assessed by a jury of the country in that behalf, according to the form of the said statute, let judgment thereupon be stayed until such time accordingly;" (then at the end) "and because, according to the form of the

said statute, a jury ought to inquire of the truth of the said breaches so assigned by the said plaintiffs, and to assess the damages that the said ——— has sustained thereby:” therefore, the sheriff of the said county is commanded to summon twelve good, &c. of his bailiwick to appear before the justices of our lord the king, assigned to take the assizes in the said county, on ———, at ———, in the said county, upon their oath to inquire of the truth of the said breaches, and to assess the damages which the said ——— has sustained thereby; and let the said justices of assize make return of the same writ, so as aforesaid to the said sheriff directed, unto the court of our said lord the king, here, on ——— next after ——— next coming, together with this writ; the same day is given to the said ——— here.

In the inquisition returned by the judge, which is in the nature of a postea, it must be alleged that the jury have found the truth of the several breaches suggested, and damages must be assessed for those breaches. See the form of the postea, 2 Saund. 187 c. and 187 d. See No. 7. The judgment should then be as usual.

“Therefore, it is considered, that the plaintiff recover against the said defendant his said debt, and also £——, for his damages which he hath sustained, as well by reason of the detention of that debt as for his costs and charges by him about his suit in this behalf expended, by the court of our said lord the king now here adjudged to the said plaintiff, with his assent. And the said defendant in mercy,” &c.

And hereupon the said ———, according to the form of the statute in such case made and provided, says, that the said writing obligatory, whereon the said judgment was so recovered against the said ——— as aforesaid, was made and given by the said ———, under and subject to a certain condition thereto subscribed, whereby, after reciting (*here state the recital, if any, preceding the condition of the bond*) it was declared, that if (*here recite the condition*) and for breach of the said condition of the said writing obligatory, the said ———, according to the form of the statute in such case made and provided, suggests, and gives the court here to understand and be informed, that (*here suggest the breaches*): And hereupon the said ——— prays the writ of our said lord the king to be directed to the sheriff of ———, and to the Right Honourable Sir Charles Abbott, knight, his majesty’s chief justice, assigned to hold pleas in the court of our said lord the king, before the king himself, (*or, if the fact be so, say, “to his majesty’s justices assigned to take the assizes in the county of ———”*) commanding the said sheriff that he cause to come before the said chief justice (*or “justices of assize”*) on ———, the ——— day of ——— next, at ———, in the county of ———, twelve, &c. by whom, &c. and who neither, &c. to inquire of the truth of the said breaches above suggested, and to assess the damages thereby sustained by the said ———, and also, that it be commanded in the said writ to the said chief justice (*or “justices of assize”*) that he (*or “they”*) make a return thereof to the said court of our said lord the king, before the king himself, at Westminster, on ——— next after ———, and it is granted to him, &c.; the same day is given to the said ———, at the same place; at which day, before our said lord the king, at

No. 8.

Suggestion of breaches in debt on bond after judgment by default with award of inquiry and return.

BREACHES, *Suggestion under the Statute; Forms.*

Westminster, comes the said ———, by his attorney aforesaid, and the said chief justice (or “justices of assize”) now here returns (or “return”) a certain inquisition indented, taken before him (or “them”) at ———, in the county of ———, on ———, the ——— day of ———, in the ——— year of the reign of our said lord the king, upon the oath of twelve good and lawful men of the same county, by which it is found, (*here recite the inquisition*) and that the said ——— hath sustained damages by reason of the aforesaid breaches of the said condition of the said writing obligatory to the sum of £ ———.

No. 6.
Suggestion of an
annuity bond.

And hereupon the said ———, according to the form of the statute in such case made and provided, says, (*here copy the suggestion to the end, and proceed as follows*): And the said ——— having prayed the writ of our said lord the king, to inquire of the truth of the said breach above assigned, and to assess the damages which the said ——— has sustained thereby, therefore, according to the form of the statute in such case made and provided, the sheriff of ——— is commanded that he cause to come before the Right Honourable ———, knight, ———, (or “before his majesty’s justices assigned to take the assizes in the county of”) at ———, in the county of ———, on ———, the ——— day of ——— instant, twelve honest and lawful men of his bailiwick, to inquire diligently, on their oaths, of the truth of the said breach above assigned, and to assess the damages which the said ——— hath sustained thereby; and the said chief justice is (or “justices of assize are”) commanded that he (or “they”) certify the inquisition to be before him (or “them”) taken to his said majesty’s court, before ———, on the ——— day of ——— instant, together with the names of those by whose oath such inquisition shall be taken, and the writ of our said lord the king to him thereupon directed; the same day is given to the said ——— at the same place; at which day before ——— comes the said ———, by his attorney aforesaid, and the said ———, (or “justices of assize”) now here returns (or “return”) a certain inquisition indented, taken before him (or “them”) at ———, in the county of ——— aforesaid, on ———, the ——— day of ———, in the ——— year of the reign of our said lord the king, upon the oath of twelve honest and lawful men of the said county, by which it is found that after the making of the said writing obligatory, (*here state the inquisition*) and that the said ——— hath sustained damages by reason of the aforesaid breaches of the said condition of the said writing obligatory to the sum of £ ———.

No. 7.
The prayer of the
writ of inquiry,
with the return
thereof by the
justices of assize
on a bastardy
bond.

“And thereupon ——— and ——— pray the writ of our lord the king to be directed to the sheriff of the county of ———, to summon a jury to appear before the justices of assize of the county of ——— aforesaid, on ———, the ——— day of ——— next, at ———, in the county aforesaid, to inquire of the truth of the said breach of the said condition, and to assess the damages which ——— and ——— have sustained thereby; and it is granted to them, returnable on ——— next after ——— days from the day of ———; the same is given to the said ——— and ——— here, &c.; and now here at this day, to wit, on ——— next after ——— days from the day of ———, come the said ——— and ———, (*the overseers for the time being, and who must now sue on such bond*) aforesaid, by their attorney aforesaid, and the aforesaid justices of the assize of the county of ——— aforesaid, before

whom the Inquisition aforesaid has been taken, have sent here their record in these words; that is to say, Afterwards, on the day and year, and at the place in that behalf within mentioned, that is to say, on ———, the ——— day of ———, in the ——— year of the reign of our lord the present king, at ———, in the county of ———, by virtue of his writ, before ———, knight, one of the justices of our lord the king, of the Bench, and ———, knight, one of the justices of our lord the king, assigned to hold pleas before the king himself, two of the justices of our said lord the king, assigned to take the assize in and for the within county of ———, according to the form of the statute in such case made and provided, the jurors of the jury whereof mention is within made, (having been duly summoned in that behalf by the sheriff of the county aforesaid) being called, to wit, (*here insert the names of the jurors*) come, and are sworn upon the said jury, according to the form of the statute in that case made, and who, upon their oath say, that the said writing obligatory within mentioned was made with the condition thereunder written and within mentioned and set forth; and that after the making of the said writing obligatory, the said ——— in the said condition mentioned, was delivered of a certain child, being the child of which she was pregnant at the time of making the said writing obligatory, and that the said child was born a bastard within the said parish of ——— within mentioned, and that the said ——— had not from time to time, and at all times after the making of the said writing obligatory, fully and clearly indemnified and saved harmless the said churchwardens, and their successors, and the parishioners and inhabitants of the said parish, from all costs and charges, by "reason of the birth, education, and maintenance of the said child, according to the form and effect and the true intent and meaning of the said condition; but, on the contrary thereof, had wholly neglected and omitted so to do, and the said churchwardens, overseers, parishioners, and inhabitants had, on account of the said neglect and omission of the said ———, and in order to preserve the life and health of the said child, been obliged to lay out and expend, and had actually laid out and expended, a large sum of money for sundry costs and charges which were necessarily incurred by reason of the birth of the said child, and its education and maintenance, during a long time then elapsed, and have thereby sustained damages; and the jurors aforesaid, upon their oath aforesaid, do assess the damages which the said ——— and ——— have sustained thereby to £——, therefore." &c. *judgment for the debt, and damages for the detention thereof, and costs to be added.*

And hereupon the said ———, according to the form of the statute in such case made and provided, suggests that the said writing obligatory, &c. (*the same as in No. 5, to the end of the recital of the condition*): And the said ——— further suggests, that in and by the said indenture of release, mentioned and referred to in the said condition of the said writing obligatory, the said ———, for the consideration therein mentioned, did grant (*here recite the release*) to have and to hold (*and also here recite the release*) but subject nevertheless to a certain proviso, condition or agreement, for the redemption of the said premises (being the proviso or condition mentioned and referred to in and by the said condition of the said writing obligatory in that behalf) whereby it was provided (*here recite the proviso*) and for a breach of the said condition of the said writing obligatory, the said ———, according to the form of the statute in such case made and provided,

No. 8.

Suggestion of breach under a proviso for redemption in a lease and release.

BREACHES, *Suggestion under the Statute*; FORMS.

further suggests, that the said _____ did not, nor would, well and truly pay, or cause to be paid, unto the said _____, the said sum of £_____, and interest in the said condition of the said writing obligatory mentioned, on the said _____ (*here insert the day*) next ensuing the date of the said writing obligatory, or at any time before or afterwards, according to and in full discharge of the said *proviso* or condition, mentioned and referred to in and by the said condition of the said writing obligatory, and according to the form and effect of the same condition, but wholly refused and neglected so to do; and therein failed and made default, and the said sum of £_____, together with a certain other sum of money, to wit, (*here state the sum so due*) as and for the interest thereof, is still wholly due and unpaid to the said _____, contrary to the form and effect of the said condition of the said writing obligatory, to wit, at (the venue) aforesaid, and hereupon the said _____ prays, &c. as in No. 5.

N. The two next following precedents having received the sanction of Mr. Serjeant Williams, I have inserted them.

No. 9.
A writ of inquiry
on the 8th & 9th
W. 3. on bond
for performance
of covenant.

George, &c. To the sheriff of _____, greeting: Whereas _____, lately in our court, to wit, in _____ term last past, before us, at Westminster, by bill without our writ, and by the judgment of the same court, recovered against _____ £_____ debt, and also £_____ for his damages which he sustained, as well by reason of the detention of that debt as for his costs and charges by him about his suit in that behalf expended, whereof he is convicted, as it appears to us on record: And whereas that judgment, in form aforesaid obtained, was had and obtained on a certain writing obligatory in a penal sum of the said £_____ debt, conditioned for the performance of certain covenants and agreements mentioned and contained in a certain indenture, bearing date the _____ day of _____, in the year _____, made between the said _____, by the name of _____, on the one part; and the said _____, by the name of _____, on the other part: by and on the part of the said _____, to be done and performed, and the same _____, according to the form of the statute in such case made and provided, with an intent to recover his damages, by reason of the breach and non-performance by the said _____ of the covenants in the same indenture contained, on the part of the said _____ to be performed, hath suggested on the roll of the said judgment for breach of those covenants that (*here insert such breaches so assigned*); therefore, according to the form of the said statute, we command you, that you cause to come before our justices assigned to take assizes in your county, on _____, to wit, the _____ day of _____, twelve free and lawful men of your bailiwick, to inquire diligently on their oath of the truth of the premises, and to assess what damages the same _____ hath sustained, as well by reason of the non-performance by the said _____ of the several covenants aforesaid, as for costs and charges of the said _____ (*plaintiff*) by him in this behalf expended; we likewise command our said justices of assize, that they certify the inquisition before them taken to us at Westminster aforesaid, on _____, together with the names of those by whose oath that inquisition shall be taken, and have there this writ.

Witness, &c.

No. 10.
A writ of inquiry
on a breach as-
signed on a simi-
lar bond.

George, &c. To the sheriff of _____, greeting: Whereas _____, late of _____, in your county _____, was summoned to be in our court, before our justices at Westminster, to answer to _____, master or warden of the college or house, commonly called Peter-

house, in the University of Cambridge, and the fellows and scholars of the bishop of Ely, of the same college, in a plea of debt, for £——, which the same master, fellows, and scholars demanded of the same ———, on a certain writing obligatory, with a condition to be void on the performance of the several articles, covenants, and agreements of a certain indenture, in such condition mentioned, on the part of the said ———, to be performed, and thereupon it was in such manner proceeded in our same court of the Bench, that the said master or warden, and fellows and scholars, should recover against the said ——— their debt aforesaid, and their damages, by reason of the detention of that debt to £——, and that the said ——— should be in mercy, &c.: And because the said master or warden, and fellows and scholars aforesaid, in replying in our same court in the plea aforesaid, said, that the said ——— his covenants between them made, according to the form and effect of the said indenture, between the said master or warden, and fellows and scholars aforesaid, by the name of ———, master or warden of the college or house, commonly called Peterhouse, in the University of Cambridge, and the fellows and scholars of the bishop of Ely, of the same college, on the one part; and the said ———, by the name of ———, of ———, in the county of ———, ———, on the other part made, had not kept, but had broke, for that on the ——— day of ———, in the ——— year of our reign, a certain orchard or garden plot, in the indenture aforesaid mentioned, was not stored, set, and planted with good fruit trees; and that on the said ——— day of ———, in the ——— year abovesaid, a certain tenement, in the indenture aforesaid likewise mentioned, was ruinous and in decay, for want of repairing the walls, ceiling, partitions, floors, ground-selling and tiling of the same, whereby the timber thereto belonging, by reason of the rain thereon falling, became decayed and rotten; and also that the said ———, the said orchard or garden plot so not stored, set, and planted with good fruit trees, permitted to remain, and to the same master or warden, and fellows and scholars aforesaid, at the end of the said term left, and likewise that the said ———, the said tenement so as aforesaid ruinous and in decay, for want of repairing the walls, ceiling, partitions, floors, ground-selling, and tiling of the same; and the said timber so as aforesaid ruinous, decayed, and rotten, permitted to remain, and to the same master or warden, and fellows and scholars aforesaid, at the end of the said term also left, against the form and effect of the indenture aforesaid: Therefore we command you that, according to the form of the statute in such case made and provided, you cause to come before our justices assigned to take assizes in your county, on ———, to wit, the ——— day of ———, at the castle of ———, in your county, twelve free and lawful men of your bailiwick, to inquire of the truth of the premises in the replication of the said master or warden, and fellows and scholars aforesaid mentioned, and to assess what damages the said ———, and the fellows and scholars aforesaid have sustained, by reason of the breach of the several covenants aforesaid, and that you have on that day before the said justices this writ; we likewise command our said justices of assize, that they certify the inquisition before them taken, to our justices of the Bench at Westminster, from the day of ———, in ———, together with this writ.

Witness, &c.

No. 11.

A writ of inquiry
before the C. J.,
B. R. in debt, on
an indenture upon
a suggestion of
breaches of cove-
nant.

George, &c. To the sheriffs of London, greeting: Whereas ———, lately in our court before us at Westminster, by bill without our writ impleaded, ——— being in the custody of the marshal of our Marshalsea, before us in a plea that he should render to the said ——— the sum of £—— and ——— of lawful money of Great Britain, which he said ——— owed to and unjustly detained from him; For that whereas therefore, to wit, on the ——— day of ———, in the year of our Lord 182—, at, &c. (*here recite the declaration down to "suit, &c."*) and such proceedings were thereupon had in our said court before us, that the said ——— afterwards recovered against the said ——— his debt aforesaid; and also ——— for his damages, which he had sustained, as well by reason of detaining the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said ——— is convicted, as appears to us of record; and the said ——— having prayed our writ to inquire of the truth of the said breach of covenant above assigned, and to assess the damages which the said ——— hath sustained thereby: Therefore, according to the form of the statute in such case made and provided, we command you that you cause to come before the Right Honourable Sir Charles Abbott, knight, our chief justice, assigned to hold pleas in our court before us at the Guildhall of the city of London, on ——— the ——— day of ——— next, twelve honest and lawful men of your bailiwick, to inquire diligently on their oaths of the truth of the premises, and to assess what damages the said ——— hath sustained by reason of the said breach of covenant; and that you have on that day before our said chief justice this writ; we likewise command our said chief justice, that he certify the inquisition before him taken to us at Westminster, on ——— next after ———, together with the names of those by whose oath that inquisition shall be taken; and that he have there this writ.

Witness Sir Charles Abbott, knight, at Westminster, the ——— day of ———, in the ——— year of our reign.

No. 12.

Writ of inquiry
by bill in debt on
bond.

George, &c. To the sheriff of ———, and to the Right Honourable Sir Charles Abbott, knight, our chief justice, assigned to hold pleas in our court before us (*or* "to our justices assigned to take the assizes in your county") greeting: Whereas ———, lately in our court before us at ———, by bill without our writ impleaded, ——— being in the custody of the marshal of our Marshalsea, before us of a plea of debt on demand for £—— of good and lawful money of Great Britain, upon and by virtue of a certain writing obligatory, in the penal sum of £——, bearing date the ——— day of ———, 182—, and sealed with the seal of the said ———: And such proceedings were thereupon had in our said court before us, that it was afterwards considered by the same court that the said ——— ought to recover against the said ——— his debt aforesaid, together with his damages which he had sustained on occasion of the detention thereof, &c. whereof the said ——— is convicted, as appears to us of record: And thereupon the said ———, according to the form of the statute in such case made and provided, suggested upon the roll, whereon the said judgment so recovered against the said ——— as aforesaid is entered, to the effect following; to wit, that the said writing obligatory, whereon the said judgment was so recovered against the said ——— as aforesaid, was made and given by the said ———, under and subject to a certain condition thereto subscribed, whereby, after reciting, &c. (*here state the recital, if any, preceding the condition of the bond*) it was declared, that if ——— (*state the condition by recital*);

And the said ——— further suggested on the said roll, whereon the said judgment, so recovered against the said ———, was and is so entered as aforesaid, that ——— (*here state the suggestion of breaches down to the prayer of a writ of inquiry, and then as follows*) as we have received information from the said ——— in our court before us: And the said ——— having prayed our writ to inquire of the truth of the aforesaid breaches of the said condition of the said writing obligatory above suggested, and to assess the damages which he hath sustained thereby; therefore, according to the form of the statute in such case made and provided, we command you, that you summon twelve good and lawful men of your bailiwick to appear before the said Right Honourable Sir Charles Abbott, knight, our said chief justice, assigned to hold pleas in our said court, before us, (or "before our said justices of assize") on ——— the ——— day of ——— next at the Guildhall of the city of London (or "at Westminster Hall, in the county of Middlesex," or "at the assizes, at ———, in the county of ———,") to inquire diligently on their oath of the truth of the premises, and to assess the damages which the said ——— hath sustained by reason of the aforesaid breaches, and that you have on that day before our said chief justice (or "justices of assize") this writ: We likewise command our said chief justice (or "justices of assize") that he (or "they") certify the inquisition before him (or "them") taken* to us at Westminster, on ———, next after after ———, together with the names of those by whose oath such inquisition shall be taken, and that he (or "they") also have there then this writ. Witness Sir Charles Abbott, knight, &c.

George, &c. To the sheriff, &c. Whereas ———, esq. having privilege of parliament, was summoned to answer ——— of a plea, that he should render, &c. (*here recite the whole of the declaration, plea, and replication*) and such proceedings, &c. down to the asterisk in the last precedent, (then proceed) to us in ——— (a general return) where-soever we shall then be in England, together, &c. (*conclude as above.*)

No. 13.

The like by original against a member of parliament.

BRIBERY.

In actions for bribery on the 2 G. II. c. 24, the plaintiff is bound to proceed without wilful delay, and if such delay is made by the prosecutor, the court, after verdict in his favour, will stay the proceedings upon motion, and he will not be allowed his costs. The defendant shall have the benefit of the act, though he do not claim it as soon as he might, for his application is not to the favour, but to the justice of the court. If the plaintiff do not proceed to trial till six years after issue joined, and assign no reason for the delay, the court will consider the same to be wilful. *Petrie v. White*, 5 T. R. 5.

Prosecutor to proceed without delay.

What is wilful delay.

An offender on a statute for bribery in parliamentary elections, discovering another so as to be convicted, and not having been before that time himself convicted, shall be indemnified and discharged of all penalties and disabilities, even after verdict. *Sutton v. Bishop*, 4 Burr. 2283. 1 Bl. R. 665. S. C.

Who shall be indemnified against penalties.

In penal actions the court will rather require that the trial of each offence should, for convenience sake, be separated as much as possible, and agreeably to this rule, in three penal actions for bribery by the same plaintiff against the same defendant, the court refused to consolidate them; there being forty instances of bribery declared upon in each action. *Benton v. Praed*, 1 Smith, 423.

As to consolidation of actions under the bribery act.

As to the venue under the bribery act.

In an action on the Bribery Act, 2 G. II. the venue was allowed to be changed, although the time for bringing a new action would expire if the present one were discontinued, and the present one could not be proceeded in by reason that the venue was not laid where the penal offence occurred. *Petre v. Craft*, 4 *East*, 433. See title VENUE. So, also, where it appeared that the plaintiff had proceeded on a mistake in supposing that the two distinct causes for which the action was brought could be proved in the county where the election was holden. *Dover v. Mestaer*, *Id.* 435.

BRIEF.

What.

The client's case detailed for the instruction of counsel.

As to brief generally.

The brief requires the utmost attention of the practitioner.

It cannot be deemed foreign to an elementary and practical compilation to dilate somewhat upon a head of such vast importance to the young practitioner as well as to his client, as that now under consideration.

What brief should contain.

The legal points of the case will have been put in issue on the record; but in a suit of law, very different in this respect from a suit in equity, the history of the case is not often intelligibly put on the record. Nice subtlety, in a course of ages, has reduced the most complex statements to a few words of legal meaning; but juries cannot be called upon to determine upon such statements; their province will in most cases be fulfilled by their finding the existence or non-existence of alleged facts, of which the record is but the legal and technical statement or deduction: it will be obvious, therefore, that the brief should contain a clear, regular, and methodical statement of the facts in plain common language.

The brief should contain a statement of the names of the parties, and an abridgment of all the pleadings; the residence and occupations of all the parties should be stated; in what character they sue or are sued, and wherefore they prosecute or resist the action.

The facts to be stated in general in the order of time.

A statement of the material facts of the case should follow in the order of time in which they severally occurred. Wills, deeds, or other instruments, registers, letters, bills of parcels, items of account, it will be obvious, can hardly admit of other than an arrangement according to time.

The elucidation, and comprehension of the case, will be much facilitated by a summary of the points or questions in issue. This will be aptly introduced at the commencement of the case; and to this summary statement, the facts, arguments, and proofs, will judiciously be made to bear a due relation.

And appropriately.

The facts should each be placed appropriately to the issue or issues intended to be tried; every proof should be connected with its particular fact.

In some cases models of plans may be of great utility for the purpose of elucidation. Their production must always be discretionary; but I have reason to know that the real merits of an important case once failed to prevail where the plaintiff took upon himself to dispense with the being prepared with models, which

his counsel and solicitor had most earnestly advised to be constructed.

Reasoning, which the ingenuity or the ability of the attorney, assisted by his near and more frequent view of the case, and from conference with his client and with the witnesses, may better suggest to him, may be aptly introduced; and strong in his own prowess, indeed, must that advocate be who will always disdain to use the weapons with which an able, well-educated, or experienced attorney may supply him.

Reasoning as well as facts. Why?

After a connected narrative of the case, to be chiefly and most usefully distinguished by a chronological statement of the facts, a more particular summary of these facts should follow in their proper order as to time and legal bearing and effect; and immediately after the summary of each fact and circumstance of evidence is added the name of the witness by whose testimony it is to be attempted to be established. The attorney may describe the witness, his employment or addition, his opportunities for knowing the facts to which he is to depose, and his competency, therefore, to offer a testimony at once clear, credible, and certain.

After the narrative what should be stated.

Somewhat of the personal character of the witness should be mentioned: as whether he be confident or timid: a witness too zealous or too prompt may require to be moderated and restrained; one modest and hesitating, to be assured and encouraged; casual obliquity of character, if any exist, should, if possible, be palliated or explained in favour of the witness.

Advert to the personal character of the witnesses.

In courts of justice as elsewhere, first impressions are much; but in courts of justice first impressions are not easily removed. Men have only to reflect on the scenes of real life, to know how much a first look, or even a first word, have influenced them in determining personal character.

The importance of first impressions.

If the attorney be previously acquainted with the nature of the evidence to be opposed to his client's case, every effort should be made to answer, oppose, confute, or repel it; and the brief for this purpose should be as full as such his knowledge will enable him to make it; to know where and when to strike is of great importance; but in a trial at law, to parry is often more effectual than to hit.

Necessary also to observe upon probable defence.

To say that a brief should be concise and perspicuous is saying that glass should be transparent; conciseness and perspicuity are not all. Where the facts are material, they cannot be too numerous; where argument is good, pertinent, and weighty, it cannot be too extended; and though what is stated may be perspicuous, perspicuity may be well aided by acuteness, ingenuity, and address.

Not enough that a brief should be concise, &c.

It has been laudably attempted to give a summary of evidence, *Imp. K. B. 421*; but such a summary is a work of itself, and a compilation of practice can hardly be expected to fulfil the function, or occupy the province of the pleader, the counsel, or the judge. Mr. Peake, in his late work on the Law of Evidence, the *Treatise of Gilbert*; Buller's and Selwyn's *Law of Nisi Prius*, may be consulted and relied upon. Mr. Phillips's very elaborate and able work has lately been superadded to these; but a really

Observation as to evidence.

BRIEF, *Form of.*

practical work on evidence, suitable for ready reference as to matters of proof, is yet a *desideratum*. I have presumed to sketch an imperfect outline of such a work under the title of EVIDENCE.*

See titles EVIDENCE. WITNESS.

FORM.

General form of
brief.

(Court, in the margin) in large round hand.

Between { _____ plaintiff,
and _____ defendant.

(Venue, in the margin) DECLARATION STATES.

That (*here state the declaration briefly divested of mere formality, such as the parties names; saying, instead of plaintiff, defendant. In trespass, replevin, ejectment, venue, or description of place, is often material; but the venue may in general be abbreviated by "at, &c."*)

Then subjoin the damage conspicuously, thus,

TO PLAINTIFF'S DAMAGE OF £—

PLEA (*in the margin*) to be abbreviated in the same manner, and every separate pleading is to be thus distinguished, as

REPLICATION (*in the margin*).

Then say

CASE.

Here insert the narrative of the case; after which say

PROOFS.

To prove that (*here insert the facts as they are to be proved, and say*) { The name and description, and if the case depend upon testimony of ancient people, add the age of the witness.

Fold the brief longways, and indorse the same with court, venue, parties names for whom the brief is delivered, counsel's name, the counsel for whom the brief is intended first, with the fee opposite his name; then say,

Sir _____ }
Mr. _____ } with you.
Mr. _____ }

Then state the time and place of trial.

On getting brief back from the counsel, see that his signature be put.

* Mr. Espinasse has published a work upon the "settling of evidence." Upon most points it may be usefully consulted; but Mr. Espinasse's great experience may be well engaged in re-

vising some of the heads there treated. I more particularly, as well as respectfully, allude to the parts where the action by baron and feme is treated.

Counsel's fees are undefined; as to their amount, the rank of the parties, the length of the brief, the number of witnesses, the importance of the case, will influence the practitioner.

(Court.)	<div style="text-align: center;">(Venuc.)</div> <div style="display: flex; justify-content: space-between; align-items: center; margin-top: 20px;"> <div style="text-align: center;"> <i>Doe</i> v. <i>Roe</i> </div> <div style="font-size: 3em; margin: 0 10px;">}</div> <div style="text-align: center;"> Brief. For the _____ [Whether plaintiff or defendant.] Mr. _____, — G^s. The names of the other } with you. counsel The time and place of trial. If a consultation be to take place; here state when, where, and with whom. Consultation fee — G^s. Name of the attorney or agent. </div> </div>
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BRIXTON. *East Half Hundred of Brixton.*

By stat. 46 G. III. c. 87. the jurisdiction of the county court has been extended to sums not exceeding 5*l*. 2 *Tidd*, 7th ed. 970.

BYE-LAWS. *Assumpsit* or debt will lie for recovery of sums due on bye-laws, *Tidd*, 7th ed. 4; so also on distress for such money, avowry and recognizance may be made, *Id.* 670.

BY-THE-BYE. See title DECLARATION.

CAPIAS.

This is a word applicable to many heads of practice in both What. courts. Its signification is "that you take;" and thence several writs and processes commanding that the person of the defendant be taken are known by the term *capias*.

An historical deduction of this, as well as of other writs, the *Commentaries*, Vol. iii. will more amply supply; and the observations that follow will be only practical.

The writ in ordinary use bearing this name is the *capias*, simply so called.

This writ is common to both courts, though under very different forms.

First, of the *capias* in K. B., and this but briefly in this place. Of *capias* in K. B. See title ORIGINAL, PROCEEDINGS BY ORIGINAL.

The *capias* in K. B. is issued upon a *precipe*, which is to contain the whole count or declaration; in which, by the statute of

CAPIAS AD RESPONDENDUM, *Not Bailable.*

additions, 1 *H. V. c. 5.* must be set forth; the defendant's estate, or degree, or mystery, and the town, or hamlet, or place, and county where he is or was conversant. *Rules*, K. B. 369. But in common cases, since the defendant can no longer have oyer of the original writ, the strict observance of this statute is unnecessary. But in outlawry such observance is still advisable; for if the place be badly set forth, it will be fatal.

CAPIAS AD RESPONDENDUM, *In C. P.*

Of capias in C. P.

It is usual in C. P. to commence the proceedings in that court by this writ.

The sheriff being thereby commanded to take the body of the defendant, and to keep the same, and to answer "*ad respondendum*," the plaintiff in a plea, &c.

Where not bailable, the FORM, No. 2. subjoined, will answer for every description of action, whether debt, covenant, trover, &c.

Further treated under what title.

Other cases affecting the *capias* in common with all *process* will be found under the title of *PROCESS*.

Where four defendants may be inserted or not.

In this writ, if not bailable, the names of four defendants may be inserted; but several defendants for several causes of action cannot be joined in the same bailable writ, or in the same affidavit. 4 *T. R.* 697.

Return.

It is made returnable on a general return day, which, though it may happen on a Sunday, must be inserted in the notice to appear, 1 *Rich. P. C. P.* 90; *Rushton v. Chapman*, 2 *B. & P.* 340; such return day and the *quarto die post* are both reckoned inclusive. *Fano v. Coken*, 1 *H. Bl.* 9.

Further as to teste and return.

It may be tested before the cause of action accrued in every case (except in cases of outlawry, *Imp.* 154); and such teste must be in term time; *Bennett v. Sampson*, *Bar.* 407; and must be returnable in term. *Mills v. Bond*, 1 *Str.* 399; but if the English notice at the foot of common process require the defendant to appear at a return day in an impossible year, it is not an irregularity for which the court will set aside the proceedings. *Steel v. Campbell*, 1 *Taunt.* 424. And it must not be expressed to be returnable before his majesty at Westminster. See *Renalds v. Smith*, 6 *Taunt.* 551.

There must be fifteen days between the *teste* and return; *Atkinson v. Taylor*, 2 *Wils.* 117; and where a whole term intervened between the *teste* and the return, the writ of *capias* was held void; *Parsons v. Lloyd*, 2 *Bl. R.* 845; 3 *Wils.* 341. S. C.; but it is now ruled that the *teste* and return may be amended. *Bouchier v. Wittle*, 1 *H. Bl.* 291. See *AMENDMENT. CAPIAS*.

It is irregular, if a *capias* be served after the date of the return, and if there be not fifteen days between the *teste* and the return; *Whale v. Fuller*, 1 *H. Bl.* 222; but see the above case of *Bouchier v. Wittle*, and *Davis, One, &c. v. Owen*, 1 *B. & P.* 342.

When may be served.

This writ may be served on a return day, *R. G. E.* 8 *G. III.*; not, it is presumed, if that be on a Sunday.

Name of filazer.

The name of the filazer need not be added to a common *capias* in C. P. *Frost v. Eyles*, 1 *H. Bl.* 120.

Name of attorney.

The name of the attorney must be indorsed on this writ, pursuant to statute 2 *G. II. c. 23. s. 22.*

Irregularity as to *teste* or return may be waived by taking the declaration out of the office. *Whale v. Fuller*, 1 *H. Bl.* 222.

Irregularity in the writ must be taken advantage of *before* appearance. *Fox v. Money*, 1 *B. & P.* 250.

In this court the *alias* or *pluries capias* is not made by the words "as before," or "as oftentimes we have commanded you;" but the difference is expressed in the *precipe*, in which it is called a *capias per continuance*.

If a *capias per continuance* be tested on the same day as the original *capias*, a new original *capias* may be sued out to warrant it, though such new original bear *teste* before the cause of action accrued. *Davis, One, &c. v. Owen*, 1 *B. & P.* 342.

A *capias* directed to the sheriff of Middlesex cannot be served in London. *Willis v. Hendrill*, 2 *N. R.* 167.

A *capias* directed into one county cannot be regularly served in another county, although it happen that the same officer is filazer for both counties. *Williams and Another v. Gregg*, 7 *Taunt.* 233.

So a *capias* directed into Kent cannot be well served in the cinque ports. *Id. ib.*

Nor out of the county into which it has been issued. *Williams and Another v. Gregg*, 2 *Marsh.* 551.

If a *capias ad respondendum* be directed to the chamberlain of the county palatine of Chester, commanding him to take the defendant, it is irregular, and the defendant may take advantage of such irregularity. *Bracebridge v. Johnson*, 1 *B. & B.* 12. *S. C.* 3 *J. B. Moore*, 237. See title PROCESS.

PRACTICAL DIRECTIONS,

WHERE CAPIAS IS NOT BAILABLE.

Prepare the MEMORANDUM or MINUTE; see which titles, if necessary.

Then prepare *precipe*, FORMS, No. 1. Get a blank *capias* at the stationer's parchment; fill same up agreeably to FORMS, No. 2. Four defendants, though for different causes of action, may be inserted in process not bailable. Carry memorandum, writ, and *precipe* to the filazer proper to the county; see Table of Offices and Officers annexed; pay signing 2s. 2d.; seal 7d.; when signed and sealed, copy, examine, and serve same personally on the defendant. Service on the return day except it be on Sunday, is good. If copy be tendered to the defendant, and refused by him, leaving the same then at his house, will be good service.

FORMS.

Middlesex, to wit. *Capias* for John Doe v. Richard Roe, trespass at Westminster, returnable in _____
(Date) _____ Attorney.

George the Fourth, by the grace, &c. To the sheriffs of London, greeting: We command you, that you take Richard Roe, late of Westminster, in your county, gentleman, and Thomas Styles, of the same place, yeoman, if they shall be found in your bailiwick, and them safely keep, so that you may have their bodies before our justices at Westminster, _____ (here insert the general return) to answer John Doe in a plea, wherefore, with force and arms, the close of the said John Doe, at Westminster, they broke, and other wrongs

Irregularity, how waived.

When irregularity to be noticed.

Of *alias* and *pluries*; or *capias per continuance*.

Capias, service in county.

No. 1.
Precipe for *capias ad respondendum* not bailable.

No. 2.
Ca. ad resp. not bailable.

CAPIAS AD RESP. &c. *Where Bailable*; -PR. DI.; FORMS.

to him did, to the great damage of the said John, and against our peace, and have you there this writ. Witness, Lord Robert Gifford, at Westminster, the _____ day of _____ (the teste, between which and the return, let there be fifteen days at least) in the _____ year of our reign.

The notice.

Mr. Richard Roe, you are served with this process to the intent that you may by your attorney appear in his majesty's court of Common Pleas at the return thereof, being the _____ day of _____ next, (the very day of the return, although happening on a Sunday) in order to your defence in this action.

The attorney's name, place of abode, and the date of issuing, to be indorsed both on the writ and copy.

PRACTICAL DIRECTIONS,

WHERE CAPIAS IS BAILABLE.

What is to be done is nearly the same; but in this as in the former title, whatever observations are quite common to all PROCESS, will be found under that title.

First prepare the affidavit of the debt, see title AFFIDAVIT OF DEBT; the sum, it will be recollected, must not be less than 15*l.*; see, if necessary, ARREST; then fill up the memorandum or minute, then the precipe, No. 1, FORMS, subjoined, then the writ of capias with the ac stiam, No. 2, FORMS, subjoined; see No. 1, AC RTIAM, or the FORM subjoined, No. 2, post, according to the nature of the case. Accompanied by the client, if he reside in town, take all these documents to the office of the proper filazer. Oath 1*s.*; signing writ, 2*s.* 2*d.*; sealing, 7*d.*; obtain warrant at the proper sheriff's office, if London or Middlesex, pay 4*d.*; Surry, Essex, or Kent, 6*d.*; other counties 2*s.* 6*d.*

On issuing a second capias, or a third, where the defendant cannot be found on the first, no words denoting the same to be an alias or a pluries, are to be inserted; but the precipe for these writs is different. See No. 3, FORMS, subjoined; pay signing alias, pluries, &c. 10*d.*; seal, 7*d.* and it is required that the date of the first writ, in case of an alias, and of the last, in case of a pluries, appear on the precipe. It may save the filazer trouble in the case of a pluries, to add the date of all the preceding writs.

The filazer, by several statutes, is to mark the day and year of his signing the bailable writ, and which is to be entered on the remembrance roll; where such date omitted, the proceedings were stayed, and the officer fined £10, pursuant to the statute 9 & 10 W. III. c. 25. s. 42. *Ridley v. Wilson*, Bar. 420.

If the defendant reside in a liberty, or in a place where the sheriff by the common course cannot enter, a non omittas capias issues; this is the same as the common capias, except that the words "that you omit not, by reason of any liberty in your bailiwick, but that you enter the same and take," &c. are added. See FORMS, No. 4, subjoined.

The precipe for the non omittas will be agreeably to No. 5.

Pay signing 8*s.* 6*d.*; sealing 1*s.* 2*d.*

No previous writ or return being necessary, this writ may now issue in the first instance.

Where venue may be laid without losing the bail.
R. G. H. 22 G. 3.

By R. G. H. 22 G. III. which recites that in actions where special bail might be required in case the defendant resided in a different county from that where the cause of action arose, and where it ought to

be laid, and might, on the part of the defendant, be compelled to be tried, but on the part of the plaintiff, to entitle himself so to have declared, it was necessary to sue a capias into the one county, and then a testatum capias into the other; and that mistakes frequently happen by putting in bail with the filazer of the county where the arrest was made, instead of in that in which the first capias issued, by means whereof a great expence and delay were often occasioned. It was therefore ordered by the court, that where an arrest should be by virtue of a capias ad respondendum in any county, and bail should be put in thereupon, and the plaintiff should think proper afterwards to declare in a different country, it should not be deemed a waiver of the bail; but the recognizance of bail should be as effectual for the benefit of the plaintiff, and he may proceed thereon against the bail, as if the plaintiff had declared against the defendant in the same county in which the bail was put in.

Where, therefore, the defendant cannot be taken in the county into which the first capias issued, the usual mode is to apply at the filazer's office for an office copy of the first affidavit, pay 1s.; but as to whether this need be done is rendered doubtful by *Boyd v. Durand*, 2 Taunt. 161. but it was decided that a second affidavit of debt was unnecessary. Ibid; then issue another writ without taking any notice of the former one, nor need there be any return of the former writ. The fees of office for the second writ are the same. The date of the first writ, as also the county, should be marked on the precipe for the second writ.

Where the defendant resides in a county palatine even, no testatum is necessary, but the capias issues in the first instance, and the debt must not be less than £20; but instead of being directed to the sheriff, it is directed as mentioned under the head DIRECTION of WRITS. But direction to the chamberlain of the county palatine of Chester is bad. For the writ itself, see FORM, No. 6. Precipe for the same, FORM, No. 7, subjoined.

Where defendant resides in a county palatine,

Neither is a testatum necessary where the writ is to be executed in a Cinque Port; see the writ, No. 8, FORMS subjoined, and the precipe, No. 9, ibid.

Or in a Cinque Port.

FORMS.

George, &c. To the sheriffs of London, greeting: We command you that you take _____, late of _____, in your county, and *Richard Styles*, late of the same place, yeoman, if they shall be found in your bailiwick, and them safely keep so that you may have their bodies before our justices at Westminster, in _____ (a general return) to answer _____, in a plea, wherefore, with force and arms the close of the said _____, at London, they broke, and other wrongs to him did, to the great damage of the said _____, and against our peace; and also that the said _____ may answer the said _____, according to the custom of our court of Common Bench in a certain plea of debt upon demand for £_____ (if in case, say, "in a certain plea of trespass on the case upon promises to the damage of the said _____, of £_____") and have you there this writ. Witness _____ at Westminster, the _____ day of _____ in the _____ year of our reign.

No. 1.
Capias in debt, requiring bail.

Ac etiam.

Ac etiam in case.

Indorse attorney's name and residence, date, and sum sworn.

No. 2.
The *precipe*.

London, to wit. *Capias* for _____ against _____, late of London, debt, "trespass" at London. Debt for £_____ (or case for £_____ upon promises) returnable _____

N. The *ac etiam* needs not be inserted in the *precipe*. Boyd v. Durand, 2 Taunt. 161.

Oath for £_____

_____, *Attorney*.
_____, *Residence*.
_____, *Date*.

No. 3.
Precipe for capias per continuance.

Middlesex, to wit. *Capias per continuance*, for _____, against _____, trespass at London. Case for £_____, upon promises, returnable on _____

Oath for £_____

_____, *Attorney*.
_____, *Residence*.
_____, *Date*.

No. 4.
Non omittas capias.

George, &c. To the sheriff of _____, greeting: We command you that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and take _____ (the rest according to No. 1, ante, page 305, including the *ac etiam*.)

No. 5.
Precipe for the above writ.

Berkshire, to wit. *Non omittas capias* for _____, against _____, late of _____ (the rest according to No. 2, *ubi supra*).

No. 6.
Capias to a county palatine.

George, &c. To the reverend father in God _____, by Divine permission, lord bishop of Durham, or to his deputy there, greeting: We command you that, under the seal of your bishopric to be duly made and directed to the sheriff of the county of Durham, you cause the said sheriff to be commanded that he take _____, late of _____, and Richard Styles, late of the same place, yeoman, if they be found in his bailiwick, and them safely keep, so that you may have their bodies before our justices at Westminster, on _____, to answer John Doe in a plea, wherefore, with force and arms (as in No. 1, ante, page 305).

No. 7.
Precipe.

County Palatine of Durham. *Capias* for _____ (as in No. 2, *ubi supra*).

No. 8.
Where *capias* executed in Cinque Ports.

George, &c. To the constable of our Castle of Dover, or to his deputy there, greeting: We command (as in No. 1, ante, page 305).

No. 9.
Precipe for same.

Cinque Ports, to wit. *Capias* for _____, late of _____, (as in No. 2, *ubi supra*).

CAPIAS AD SATISFACIENDUM; or, as abbreviated and known in practical language, *Ca. sa*.

For cases and observations common to execution generally, see title EXECUTION.

As the writ treated in the former table was said to be a commencement of the action, so this may be said to be a writ concluding it.

What.

It issues on the judgment against the person of the defendant.

It derives its title from the words "to satisfy" the defendant, *ad satisfaciendum*; and before stat. 21 J. 1. c. 24. it was deemed the highest satisfaction one man could have of another; but by that statute a new execution may be awarded against the lands of him that dies in execution. Still it is the highest satisfaction that can be had in the defendant's life-time.

This writ does not lie against peers of the realm or their wives, Scotch or Irish; except upon a statute merchant, stat. 11 *E. I.* or statute staple, stat. 27 *E. III.* or on a recognizance in nature of a statute staple upon stat. 23 *H. VIII. c. 6.* nor against members of parliament; and before executors or administrators are held liable on this writ for the debt of their testator or intestate, a *devastavit* must be returned, and then a *ca. sa.* lies against their bodies; nor does it lie against a servant of the king. *Bartlett v. Hebbes*, 5 *T. R.* 686.

Against whom it does not lie.

But it appears that the body of a defendant may be apprehended on a judgment without the intervention of this writ; as where such judgment is given against one who is in view of the court, or in Westminster Hall, it may be executed immediately, and the party taken, and sent for in court and committed. *Anon. 3 Salk.* 160.

Where defendant may be committed without *ca. sa.*

But if a sheriff seize under a *fi. fa.* he cannot, although that writ be abandoned, take the defendant under a *ca. sa.* without first making a return of the *fi. fa.* *Miller v. Parnell*, 6 *Taunt.* 370. Defendant discharged out of custody on *ca. sa.* on ground that writ recited prior *feri facias* and levy, but omitted sheriff's return, but terms imposed of bringing no action of trespass. *Wilson v. Kingston*, 1 *Chit. R.* 134.

Where return of *fi. fa.* necessary.

If the judgment be joint and against two, a *ca. sa.* against one is void, and a discharge of one of several defendants taken on a joint *ca. sa.* is a discharge of all from execution affecting the person. *Clark v. Clement*, 6 *T. R.* 525; but though two defendants be in custody on a *ca. sa.* and one of them be discharged under an insolvent act, the other shall not be discharged; the discharge of the one was the act of the law. *Nadin v. Battre*, 5 *East*, 147.

Where judgment joint.

Where the plaintiff died intestate, and his family neither took out administration, nor would interfere on the present motion, C. P. discharged a defendant out of custody. *Broughton v. Martin*, 1 *B. & P.* 176. S. P. *Parkinson v. Horlock*, 2 *New. R.* 240. In each case, it seems, the next of kin should be duly served with a rule *nisi*; likewise when the plaintiff was dead, the same court discharged an attorney out of custody under the Lords Act. *The King v. Davis*, 1 *B. & P.* 336. Where the defendant's wife administered to the plaintiff, the court discharged the defendant out of custody, nor would it permit the plaintiff's attorney to retain the defendant for the costs. *Pyne v. Erle*, 8 *T. R.* 407.

Where satisfied otherwise than by payment.

A defendant taken on a *ca. sa.* being once discharged, cannot be again taken on that judgment. *Tanner v. Hague*, 7 *T. R.* 420. *Blackburn v. Stupart*, 2 *East*, 243.

Where defendant cannot be again taken.

If the principal be actually in the custody of the sheriff at the time when he, at the instance of the plaintiff, return *non est inventus* to a *ca. sa.*, the court will set aside such return, together with all subsequent proceedings against the bail, and order the money levied under an execution to be returned to them. *Forsyth v. Marriott*, 1 *N. R.* 251.

Where return set aside in favour of bail.

Though before issuing a *testatum ca. sa.* into the county where the venue is laid be necessary, yet the court will not set the *testatum* aside for want of such *ca. sa.* provided that the writ appear

So as *ca. sa.* appear *testatum ca. sa.* not set aside.

May be amended.

In C. P. sufficient to produce the execution returned.

to the court to be properly entered on the roll. *Milstead v. Coppard*, 5 T. R. 272. And where it was objected that the *testatum ca. sa.* was not warranted by the judgment, the court allowed the writ to be amended by the record, and refused to set the *testatum ca. sa.* aside. *Shaw v. Maxwell*, 6 T. R. 450. *Cowperthwaite v. Owen*, 3 T. R. 657. S. P. as to a *feri facias*.

In C. P. it has been held sufficient to produce the *feri facias* sued out and returned. *Burdus v. Satchwell*, Bar. 208. *Sweetapple v. Atterbury*, *id.* 211. See *Wilson v. Kingston*, 1 Chit. R. 134. cited *ante*, page 307.

See titles AMENDMENT, *Ca. sa. ante*, page 45. BAIL. EXECUTION. FIERI FACIAS. OUTLAWRY. PRISONER.

PRACTICAL DIRECTIONS, K. B.

Get blank ca. sa. at the stationer's, seal only; but Mr. Tidd, 1044. cites R. G. E. 1659. as an authority for its being signed also; but the practice is otherwise; pay 7d. testatum 1s. 2d. Indorse the writ to levy the sum due and (agreeably to 43 G. III. c. 46. s. 5) all sheriff's fees, poundage, &c. See title POUNDAGE.

PRACTICAL DIRECTIONS, C. P.

But little different from K. B. The writ is to be signed by the prothonotaries; pay 4d. seal 7d. testatum double. The FORMS are somewhat, though very little, different. The return must be general, and instead of saying "lately in our court before us," say, "lately in our court before our justices at Westminster."

In a testatum, instead of "returned to us" say, "returned to our justices at Westminster."

K. B. C. P.

If the defendant reside in a county different from that in which the venue is laid, first issue a ca. sa. into the county where venue laid, then issue a testatum ca. sa. into the county where notice is; they are generally sealed together; pay for the testatum ca. sa. 1s. 2d. Get warrant at the sheriff's office, pay 2s. 6d. On bond, or other penalty, you may indorse the writ, to levy the whole debt and damages recovered, and also sheriff's fees, poundage, &c.

The name of the attorney should also be indorsed, with the date of issuing.

FORMS.

So much of the writ as describes the cause of action, and the ground of issuing the execution, should pursue the words of the judgment.

No. 1.
Capias ad satisfaciendum in case.

George, (&c.) To the sheriff of ———, greeting: We command you that you take ———, if he be found in your bailiwick, and him safely keep, so that you have his body before us at Westminster, on ———, to satisfy ———, £———, which were adjudged to the said ———, in our said court before us at Westminster, for his damages which he had sustained, as well by reason of the non-performance of certain promises and undertakings made by the said ——— to the said ———, as for his costs and charges by him about his suit in that behalf expended, whereof the said ——— is convicted, as appears to us of record, and have you there then this

writ. Witness Sir Charles Abbott, knight, at Westminster, the _____ day of _____, in the _____ year of our reign.

Take the whole. *Indorse* } *(The name of the person who signs the writ.)*
attorney's name, and date. }

George, (&c.) To the sheriff of _____, greeting : We command you that you take _____, if he be found in your bailiwick, and him safely keep, so that you have his body before us at Westminster, on _____, to satisfy _____, as well a certain debt of £_____, which the said _____ lately in our court before us at Westminster recovered against him, as also £_____, which in our said court before us were adjudged to the said _____, for his damages which he had sustained, as well by occasion of the detaining that debt as for his costs and charges by him about his suit in that behalf expended, whereof the said _____ is convicted, as appears to us of record, and have you there then this writ. Witness Sir Charles Abbott, knight, at Westminster, the _____ day of _____, in the _____ year of our reign.

No. 2
The like in debt.

Signature as No. 1.

(Indorse as before.) Take £_____ *(the whole sum due for principal, interest, and costs)* and also sheriff's fees, poundage, and all other expences.

_____, For his damages which he had sustained, as well by reason of certain breach of covenant made between the said _____, and _____, as for his costs and charges in and about his suit in that behalf by him expended, whereof the said _____ is convicted, as appears to us of record.

No. 3.
Ca. sa. in covenant.

_____, For his damages which he had sustained, as well by occasion of a certain trespass and ejectment of farm done to the said _____, by the said _____, at _____, in your county, as for his costs and charges in and about his suit in that behalf by him expended, whereof *(as above.)*

No. 4.
The like in ejectment, where damages are recovered.

_____, For his damages which he had sustained, as well by occasion of the taking and unjustly detaining the sheep of the said _____, at _____, in a certain place called the _____, in your county, as for his costs and charges *(as above.)*

No. 5.
The like in replevin.

_____, For his damages which he had sustained, as well by occasion of a certain trespass then lately committed by the said _____, as for his costs and charges *(as in No. 4.)*

No. 6.
The like in trespass.

_____, For his damage which he had sustained, as well by occasion of a certain trespass and assault, then lately committed by the said _____, on the said _____, as for his costs and charges *(as in No. 4.)*

No. 7.
The like in trespass and assault.

_____, For his damages which he had sustained, as well by occasion of the speaking and publishing certain false and scandalous words by the said _____ of the said _____, as for his costs and charges in and about *(as in No. 4.)*

No. 8.
The like for damages for words.

_____, To satisfy _____, £_____, which were adjudged to the said _____ in our court before us at Westminster, according to the form of the statute in such case made and provided, for his costs and charges by him laid out in and about his defence in a certain plea of trespass on the case, prosecuted in our said court before us by the

No. 9.
The like for costs on a verdict for the defendant.

CAPIAS AD SATISFACIENDUM; FORMS.

said _____ against the said _____, whereof the said _____ is convicted, as appears to us of record, and have you there then this writ. Witness, _____

No. 10.
The like for costs
on a nonsuit.

_____ To satisfy _____, £_____, which were adjudged to the said _____, in our court before us at Westminster, according to the form of the statute in such case made and provided, for his costs and charges which he sustained by reason of the false claims of the said _____, in a certain plea of trespass upon the case prosecuted in our said court before us by the said _____ against the said _____, whereof the said _____ is convicted, as appears to us of record, and have there then this writ. Witness, _____

No. 11.
The like for exe-
cutor in debt.

To satisfy _____, executor of the last will and testament of _____, deceased, as well a certain debt of £_____, as also £_____ for his damages, which he had sustained, as well by occasion of the detaining the said debt as for his costs and charges laid out by him about his suit in that behalf, whereof the said _____ is convicted, as appears to us of record, and have there then this writ. Witness, _____

No. 12.
The like for a
penalty.

To satisfy us and _____, who sues as well for us as for himself in this behalf, £_____ debt, which the said _____, who sues as aforesaid in our court before us, recovered against the said _____, (to wit) one moiety thereof, to wit, £_____ to the said _____, who sues as aforesaid, to his own proper use, and the other moiety thereof to our own proper use, according to the form of the statute in such case made and provided, whereof the said _____ is convicted, as appears to us of record, and have there then this writ. Witness, _____

No. 13.
The like for ex-
ecutor against
administratrix
after decessatit
returned on *fi. fa.*
by former sheriff
of part of a debt.
In debt.

George, (&c.) To the sheriff of _____, greeting: Whereas by our writ we lately commanded our sheriff of _____ aforesaid, your predecessor, that of the goods and chattels of _____, deceased, at the time of his death in the hands and custody of _____, widow, administratrix of the goods, [*describe the defendant as in the declaration,*] in your bailiwick, he should cause to be made £_____ of debt, also £_____ for his damages, which _____, executor of the last, [*describe the plaintiff as in the declaration,*] sustained, as well by the occasion of the detaining that debt as for his costs and charges expended by him about his suit in this behalf, whereof the said _____ is convicted, as appears to us of record, if she had so much in her hands; and if she had not so much in her hands, then that he should cause the said damages to be made of the proper goods and chattels of the said _____, (*the administratrix*): And that he should have that money before us at Westminster, at a certain day now past, to be rendered to the said _____, executor as aforesaid, for the debt and damages aforesaid; and our said sheriff of _____, at that day returned to us, amongst other things, that divers goods and chattels, which were of the said _____, (*the intestate*) at the time of his death to the value of _____, parcel of the said debt, after the death of the said _____, (*the intestate*) and before the coming of that writ to our said sheriff directed, had come to the hands of the said _____, (*the administratrix defendant*) to be administered, which said goods and chattels the said _____ (*the administratrix*) before the coming of the said writ so to him directed, had wasted, and converted, and disposed to her own use, so that he could in no manner cause to be made the said £_____, or any parcel thereof, of the said

goods and chattels: And he further certified to us that the said ———, (*the administratrix*) had no goods or chattels in his bailiwick, whereof he could in any manner cause to be made the said £—— of damages aforesaid, or any parcel thereof: *Therefore, we command you that you take the said ———, (the administratrix) if she shall be found in your bailiwick, and safely keep her so that you may have her body before us at Westminster, on ——— next after ———, to satisfy the said ———, (the executor) the said ———, parcel of the said debt in form aforesaid: And have then there this writ.* Witness, ———

George, (&c.) To the sheriff of ———, greeting: Whereas we lately commanded our sheriff of ———, that he should take ———, of ———, in your county ———, bail of ———, if he should be found in his bailiwick, and safely keep him, so that he might have his body at Westminster, on ——— next, after the ———, to satisfy ———, of £—— for his damages, which he sustained, as well by the occasion of the not performing certain promises and undertakings lately made by the said ——— to the said ———, as for his costs and charges expended by him about his suit in this behalf, whereof the said ——— is convicted, as appears to us of record: And whereupon, in our same court before us, it is considered that the said ——— have his execution against the said ——— of the damages aforesaid, according to the force, form, and effect of a certain recognizance by the said ———, in our court before us, thereupon lately acknowledged to the said ———, as also appears to us of record: And our said sheriff of ——— that day returned to us that the said ——— was not found in his bailiwick: Whereupon, on the behalf of the said ———, it is sufficiently testified in our court before us, that the said ——— lurks and wanders in your county: Therefore we command you that you take the said ———, if he shall be found in your bailiwick, and safely keep him so that you may have his body before us at Westminster, on ——— next, after ———, to satisfy the said ——— on the damages aforesaid; and have there then this writ. Witness, ———

No. 14.
Testatum ca. ss.
against one bail
in case, B. R.

George, (&c.) To the sheriff of ———, greeting: Whereas we lately commanded our sheriff of ——— that he should take ——— if he should be found in his bailiwick, and safely keep him so that he might have his body before us, on the ———, wheresoever we should then be in England, to satisfy ———, of £—— of debt, which the said ——— lately in our court before our justices of the Bench at Westminster recovered against him, and of £——, which in our same court of the Bench were adjudged to the said ———, for the damages which he sustained by the occasion of the detaining of that debt, and also of £—— by our court before us adjudged to the said ———, according to the form of the statute in such case lately made and provided, for his damages, costs, and charges, which he had, by the occasion of the delaying of the execution of the said debt and damages, by the pretext of the prosecution of our certain writ of error by the said ———, prosecuted in our said court before us of and upon the premises whereof he is convicted, as by the inspection of the record and process thereupon, which for certain causes we caused to come before us, as appears to us of record: And whereupon in our same court before us it is considered that the said ——— have thereupon his execution against the said ——— of the debt, damages, costs, and charges aforesaid: And our said sheriff

No. 15.
Ca. ss. in debt,
and for costs in
error after judg-
ment. By origi-
nal.

CAPIAS AD SATISFACIENDUM; FORMS.

of Middlesex at that day returned to us that the said _____ was not found in his bailiwick: *Upon which*, on the behalf of the said _____, it is sufficiently testified in our said court before us, that the said _____ lurks and wanders in your county: Therefore we command you, that you take him if he shall be found in your bailiwick, and safely keep him, so that you may have his body before us, in _____, wheresoever we shall then be in England, to satisfy the said _____ of the debt, damages, costs, and charges aforesaid; and have there then this writ. Witness, _____

No. 16.

*Ca. ss. against executrix by surviving executors. Writs of *fi. fa.* and *sci. fa.* recited.*

George, (&c.) To the sheriff of _____, greeting: Whereas by our writ we lately commanded you that of the goods and chattels which were of _____, deceased, at the time of his death in the hands of _____, widow, executrix of the last will and testament of the said _____, in your bailiwick, you should cause to be made £ _____ of debt, which _____ and _____, surviving executors of the last will and testament of _____, deceased, lately in our court before us at Westminster, recovered against the said _____, as also £ _____, which in our same court before us were adjudged to the said _____ and _____, for their damages which they had sustained, as well by the occasion of the detaining of that debt, as for their costs and charges expended by them about their suit in that behalf, whereof she was convicted, as appeared to us of record, if she had so much in her hands; and if she had not so much in her hands, then that you should cause the said damages to be made of the proper goods and chattels of the said _____: And whereupon it was considered in our court before us, that the said _____ and _____, the surviving executors of the said _____, should have their execution against the said _____, of the debt and damages aforesaid to be levied of the goods and chattels which were of the said _____, in the hands of the said _____, to be administered, if she then had so much in her hands; if she then had not so much in her hands, then the said damages to be levied of the proper goods and chattels of the said _____: And that you should have that money before us at Westminster, on _____ next after _____, to render to the said _____ and _____ for the debt and damages aforesaid, &c.: And you, the sheriff of _____ aforesaid, at that day returned to us that the said _____ had no goods or chattels in your bailiwick, which were of the said _____ at the time of his death, in her hands to be administered, whereof you could cause to be made the debt or damages aforesaid, or any part thereof; nor had the said _____ any of her own proper goods or chattels in your bailiwick, whereof you could cause to be made the damages aforesaid, or any part thereof, according to the command of the said writ: And thereupon in our court before us, afterwards it was in such sort proceeded that by our said court before us it was considered that the said _____ and _____, the surviving executors of the said _____, should have execution against the said _____, of the said £ _____ of debt, as also the said £ _____ for the damages, costs, and charges aforesaid, to be levied of the proper goods and chattels of the said _____: And it was further considered by our same court before us, that the said _____ and _____ should recover against the said _____, £ _____ for their costs and charges expended by them about their suit, by occasion of the prosecuting our writ of *scire facias* in that behalf by our same court before us, adjudged to the said _____ and _____ at their request, according to the form of the statute in such case made and provided: There-

fore we command you that you take the said ———, if she shall be found in your bailiwick, and safely keep her so that you may have her body before us at Westminster, on ——— next after ———, to satisfy the said ——— and ——— of the said £—— of debt, and the said £—— for their costs and charges aforesaid, as of the said £—— for the said costs and charges, adjudged as aforesaid to the said ——— and ———, according to the form of the statute; and have there then this writ. Witness, ———

CAPIAS UTLAGATUM. See title **OUTLAWRY.**

This writ issues upon the judgment of outlawry being returned by the sheriff upon the *exigent*, and it takes its name from the words of the mandatory part of the writ, which states the defendant being outlawed "*utlagatum*," or "*ut*." What.

It is either general or special; general, when against the body only; special, when against the body, goods, and lands. The Forms for both are subjoined, Nos. 1. and 2.

By stat. 4 & 5 W. & M. c. 18. s. 4. the sheriff is empowered, where persons are taken upon this writ, in cases where special bail is not required, to take an attorney's engagement in writing, to appear for such defendant and to reverse the outlawry, and thereupon to discharge the defendant from such arrest. And in cases where special bail is required, the said sheriff may take sureties in bond, in the penalty of double the sum, to appear at the return of the writ, and thereupon the defendant to be discharged from such arrest. Stat. 4 & 5 W. & M. c. 18. s. 4.

And by 5th section, bail for the above purpose may be taken, and the defendant discharged thereon after the return of the writ.

It has been ruled upon this statute, that the usual form for taking the recognizance of bail, is to pay the condemnation money, and not in the alternative to pay it or render the defendant. Of the recognizance.

Mathews v. Gibson, 8 East, 527. Where it appeared that the judgment of outlawry was entered after the plaintiff's death, and that the *capias utlagatum* issued without a revival of the judgment, the same was set aside. The plaintiff's death. Where judgment of outlawry after plaintiff's death.

King v. Manby, Bar. 325. On the special *capias utlagatum*, goods and lands also, as well as person, may be extended; see Form No. 2, subjoined; but it is well observed, 2 Crompt. 40, that if the goods and lands shall not be of value sufficient to pay all the charges of petitioning, &c. and to put the plaintiff something in pocket towards his demand, it will not be worth while to proceed, and the court will not restore goods taken upon this writ; but they will of course be restored upon the coming in of the defendant, and the consequent reversal of the outlawry. But see 1 Tidd, 155, where it is said generally, that the court will not restore goods upon this statute taken upon a special *capias utlagatum*. Per Cur. What may be taken.

M. 20 G. III. K. B. The money raised by the sheriff under these writs cannot, by any ordinary process against the sheriff, be obtained by the plaintiff; the sheriff is accountable to the crown only for the same. The chattels of outlaws have ever been considered as belonging to the king; the very harbouring an outlaw was fineable. Hugh de Of the disposition of the money raised.

Lacy's Town of Burford was charged with ten marks for harbouring an outlaw, temp. H. II. 1 *Mad. Exch.* 85. and the sheriff, temp. H. II. accounted for the chattels of outlaws, *Id.* 345. So likewise the king had the lands of an outlaw for a year and a day, temp. H. III. *Id.* 347.

Of restitution.

If the goods of the outlaw be taken by the sheriff, and after the outlawry is reversed by writ of error, the defendant shall have the goods again, because the sheriff was not compellable to sell those goods, but only to keep them to the use of the king. *Roll. Abr.* 778. Ognell's case, *Cro. Eliz.* 270. *Eyre v. Woodfine*, *Id.* 278. In this last case, it seems that the court differed as to whether restitution should be made if the chattels had been sold, and it was certainly ruled that it should; *Periam, J. dub.*

And where it was sworn that the goods taken under a *capias utlagatum* were the separate property of the wife of the outlaw, the court would not restore them, but left her to her claim in equity. *Biscoe v. Kennedy and Wife*, 2 *Wils.* 127.

Writ not executed on Sunday.

The defendant cannot be taken on a Sunday upon a *capias utlagatum*, that writ being within the statute 29 C. II. c. 7. *Osborne v. Carter*, *Bar.* 319.

With whom filed.

The writ of *capias utlagatum*, with the sheriff's return, ought to be filed with the clerk of the exigents. *Reynolds v. Adams*, 3 *T. R.* 578. In this case the clerks of the treasury chamber, and of the exigents, claimed, and in fact exercised, as it appeared by their respective affidavits, the right of receiving and filing the *capias utlagatum*. The master reported in favor of the clerk of the exigents, but Lord Kenyon, C. J. desired that it might be understood, that it was *afterwards* to be carried to the office of the *custos breviarum*; so that it will be advisable that the practitioner make his searches in relation to this writ in both offices.

PRACTICAL DIRECTIONS.

As the practitioner will have been apprized, from the general head OUTLAWRY, and from each particular head of proceeding to be adopted previously to the issuing the writ of capias utlagatum, of what will have been necessary to be done before issuing the same; repetition in this place will be unnecessary.

Immediately on obtaining the writ of exigent, with the return, you carry it to the clerk of the outlawries, who is the filazer, K. B. or to the filazer for the county, C. P.; such officer thereupon makes out either a general or a special writ of capias utlagatum; the nature of and distinction between which hath been mentioned above. For the general or personal writ, see FORM, No. 1.; pay signing 7s. 8d.; sealing 7d.; warrant thereon 2s. 4d. The defendant being taken on this writ, either undertakes by his attorney or he gives bail duly to appear according to the statute; or he remains in the custody until the outlawry be reversed; or until a charter of pardon be granted; or he be otherwise delivered by due course of law. And semble, that bankruptcy and certificate is no ground of discharge of a prisoner in custody on a capias utlagatum. Beauchamp v. Tomkins and Schneider, 3 Taunt. 141.

I have subjoined a special return to a general capias utlagatum, FORMS, No. 2.

But if the defendant possess goods or lands, a special capias utlagatum may be issued. See FORM, No. 3, and upon this writ the plaintiff may ultimately, as will appear, obtain satisfaction for his debt.

On the writ being delivered to the sheriff, he is of course instructed as to the place where the goods or lands may be found, and thereupon proceeds to impanel a jury, whose province will be well gathered from the terms of the writ subjoined. See FORM, No. 3. The expence is said to be from two to three guineas. A subpoena may be issued and served on witnesses who may be otherwise unwilling to attend; and it is said that it "may not be improper to give notice of this inquisition being to take place as on a writ of inquiry." 1st Rule, K. B. 380.

It is said, that under this writ debts due to the plaintiff may be taken or extended. This was doubted till Slade's case, 4 Co. especially as it is expressly laid down in 2 Roll. Abr. 806, that a man outlawed in a personal action does not forfeit debts due to him on contract; but since Slade's case, the same point has been recognized, particularly in Webb v. Moore, 2 Vent. 282; but neither copyhold nor trust property can be touched under this writ.*

The sheriff upon this writ returns an inquisition. See FORMS, No. 4, which must be carried to the filazer, K. B. and to the clerk of the outlawries, C. P.; thence it is to be delivered or filed in the office of the custos brevium; this officer will transcribe the inquisition, and transmit it into the court of Exchequer.

From this court may be issued a venditioni exponas to sell the goods and a scire facias to recover the debts; also a levari facias, by which the issues and profits of lands of the outlaw may be levied. The operation of the levari facias is extensive; for, agreeably to the case of Briton v. Cole, 1 Ld. Raym. 365, not the moveables only of the party, but also of any other person, and cattle levant and couchant, found on the land extended, may be seized and sold.

It will be necessary that an eight-day rule should be given on the back of the transcript, before any venditioni exponas issue to sell them; and if there be not eight days in term time, the rule may be given for the general seal out of term. The use of this rule is to afford an opportunity for any one to come in and claim the goods.

On the expiration of this rule, apply at the remembrancer's office for a venditioni exponas. See FORM, No. 5, venditioni exponas, which being obtained and delivered to the sheriff, he will proceed to sell the goods, and make return of the writ. See FORM, No. 6. If the produce amount to not more than 50l. the court of Exchequer will, on motion, stating the

* As to trust property being exempt from its operation, Mr. Tidd, 156, has intimated, in a note, a doubt whether the 10th section of the statute of frauds may not have removed this exemption. There does not appear any determination later and more in point than that of *The King v. Holland*, Sty. R. 41, yet long previously to that statute. Where Mr. Tidd has doubted, it will hardly be expected of me to determine; but it may be seen that the statute relates to such lands, &c. as the sheriff could deliver to the plaintiff. The words of the statute are, that it shall be lawful for the sheriff, for and upon any judgment, &c. to deliver execution unto the party on that behalf, &c. such lands, &c. in trust, in like manner as if the defendant

himself had been seized of the same. Now it may be remarked that lands, when taken by the sheriff under this writ, are not commanded to be delivered by him to the party, but that he (the sheriff) is to take them into the king's hands, &c.; and it may be farther observed that the party can only avail himself of lands taken under this writ, by special application to the king's exchequer, or to the lords of the treasury.

Besides, the common writ of possession, and that of *elegit*, appear to be framed with an immediate view to satisfying a judgment to the party, and therefore they may be presumed to be competent to touch lands in trust agreeably to the statute, but the *capias utlagatum* is silent as to such view.

facts on affidavit, order the same to be paid to the plaintiff; but if the produce exceed that sum, a petition must be presented to the Lords of the Treasury, on the part of the plaintiff; a reference is made by them to their solicitor, who examines into the facts of the case. See FORM OF PETITION, FORM, No. 7, subjoined. The reference thereon is generally agreeably to No. 8, FORM subjoined.

Then let the plaintiff make an affidavit to the effect, No. 9, FORM subjoined. This affidavit, with the attorney's bill, the venditioni exponas, and the return, together with the certificate of the proceedings on the outlawry, to be signed by one of the sworn clerks of the Exchequer, No. 10, FORM subjoined, must be all submitted to the solicitor of the Treasury; his fee 1l. 1s.

On this officer's report, see FORM, No. 11, a warrant is issued from the Treasury, directed to the attorney general, authorizing him to consent that so much of the money as may remain in the sheriff's hands, after deducting the poundage, be paid over to the plaintiff towards satisfying the debt and costs. See FORM, No. 12. The attorney general's fee two guineas, his clerk 2s. 6d. Payment-over cannot be made until an order or rule for that purpose is obtained on motion in the court of Exchequer. The attorney general's consent is of course; the order or rule so to be obtained on motion is engrossed, put under seal, and a subpoena annexed to perform it served on the sheriff, and the money is immediately paid over, or an attachment may be moved for non-performance of the order, 1 Tidd, 158, who cites Imp. 448, and 2 Crompt. 47. The subpoena will be found below, FORM, No. 13. The order also will be found below, No. 14.

The following extract verbatim, from Mr. Crompton, will be found of great importance, so far as it is practical; it relates wholly to the plaintiff seeking to recover his debt from the land, and its issues, belonging to the outlaw, by means of the capias utlagatum. I have inserted the extract, because other books of practice, for the most part, are very brief or altogether silent on the subject.

"If the inquest, upon a special capias utlagatum, find the outlaw seised or possessed of lands, the different parcels, in whose tenure, and of what value beyond reprises the same amount to, must all be set forth in the inquisition with convenient certainty; And then the prosecutor, by issuing writs of levavi facias out of the Exchequer for the sheriff to levy the profits, and on the return thereof, by suing out writs of venditioni exponas for selling those profits, and afterwards by petitioning to have the monies raised thereout paid to him in the manner before mentioned, may obtain a satisfaction for his debt and costs of the outlawry.

But if the prosecutor's debt amounts to a considerable sum, and the outlaw has a freehold interest in the lands, and does not come in and reverse the outlawry, and there is no incumbrance prior to the inquisition on those lands, then the prosecutor may obtain a lease of those lands out of the Exchequer, or a grant thereof under the privy seal. To obtain a lease it will cost the prosecutor 25l. or upwards, but such lease being cheaper than a grant under the Privy Seal, it has a preference to the other method of proceeding.*

If the prosecutor would have a lease of the lands found by the inquest, he may obtain such lease by applying to the Lords of the Treasury, stating

* I say a freehold interest, because a chattel real, as a term for years, may be sold by a venditioni exponas, but a freehold cannot; for an outlaw in civil cases

does not forfeit his freehold lands, but only the profits thereof, during his outlawry.

(in the nature of a petition) the amount of his debt, the proceeding to outlawry, and the substance of the inquisition on the *capias utlagatum*.

On presenting this petition, the secretary will make out a warrant for a particular to the remembrancer of the Exchequer, whereupon the deputy remembrancer will certify a particular of the parcels of land and value thereof found by the inquest.

This particular being signed by the deputy remembrancer, must be carried back to the secretary of the Treasury, who will thereupon grant a warrant for a lease, which is made out at the Pipe-office of the court of Exchequer.

When the prosecutor has obtained a lease, if the tenants of the lands will not attorn tenants to the lessee, and pay their rents to him voluntarily, he may sue out writs of *levari facias* from time to time to levy the same as they become due, and when returned, the court of Exchequer, on motion and production of the lease, will order the sums levied, whether small or great, to be paid over to the prosecutor, or lessee, without any further application to the Treasury.

Under a lease or *levari*, the party may take the issues* and profits of the lands to the value extended, but neither the king or his lessee can plough the land, nor cut the wood, or underwood, upon it.

As to issues, the case of *Britton v. Cole*, Salk. 392. *Ld. Raym.* 305. and *Com.* 51, is worthy of notice.

The sheriff under a *levari*, or prosecutor by virtue of a lease, must not take more than the value extended by the inquest; but if the value is greater than found, a writ of *melius inquirendum* may go to find the full value, and such a writ may also go if the inquisition be defective, and does not ascertain the outlaw's title, or the parcels of the lands sufficiently.

If the inquest should undervalue the land, or if all the outlaw's lands or effects should not be discovered at the time of taking the inquisition; or if there should be any defect in the return, a writ of *melius inquirendum* may go from the Exchequer, on which the sheriff must summon another inquest, and inquire more particularly, and return the inquisition, which he shall thereupon take to the barons."

FORMS.

I shall make no apology for introducing the whole of the precedents; they are, I believe, authentic, and the best practical instructors, since from them appear the grounds and reasons of the practice, as well as the practice itself.

George, (&c.) To the sheriff of ———, greeting: We command you that you do not omit, by reason of any liberty in your county, but that you take ———, late of ———, being outlawed in your said county (or insert instead the county where the outlawry was proclaimed) on ———, the ——— day of ———, (or in London, on ———, next after ———) last past, at the suit of ———, of a plea (here describe the nature of the action, whether debt or trespass. If the writ issue into a different county from that in which the outlawry of the defendant was proclaimed, say "as our sheriff of ——— returned to us at Westminster, at a certain day now past,") if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us on ———, wheresoever we shall then be in England, to do and re-

No. 1.

A general or personal writ of *capias utlagatum*.

* What shall be accounted issues, vide stat. *Westm.* 2. c. 39. And let the sheriff know that rents, corn in the grange,

and all moveables (except horse-harness and household-stuff), be contained within the name of issues.

CAPIAS UTLAGATUM; Forms.

ceive what our court before us shall consider of him in this behalf, and have there this writ. Witness, _____

No. 2.
A return of special *capias utlagatum*. See No. 4.

By virtue of this writ to me directed, I have taken the body of the within-named _____, whose body I kept in my safe custody, until afterwards, to wit, on the _____ day of _____, in the _____ year of his now majesty's reign, on which day I received his majesty's writ of *habeas corpus cum causa* to me directed; by virtue of which writ, immediately after the receipt thereof, on the said _____ day of _____, I did conduct the body of the said _____ before _____, one of the justices of the king's court of the Bench, according to the command of the said writ, which said justice did then receive from me the body of the said _____, and did commit him to the custody of the warden of his majesty's prison of the Fleet, and did then discharge me from the further keeping of the said _____; and therefore I cannot have the body of the said _____, before our lord the king, on the day within-mentioned, wheresoever our said lord the king shall then be in England, as by the said writ I am commanded. The further execution of this writ appears on the inquisition and inventory hereunto annexed. See No. 4, *subjoined*.

No. 3.
A special *capias utlagatum*.

George, (&c.) To the sheriff of _____, greeting: We command you that you omit not, by reason of any liberty in your bailiwick, but that by the oath of good and lawful men of your county, you diligently inquire what goods and chattels, lands and tenements, _____, late of _____, in your county _____, hath or had in your bailiwick, on the _____ day of _____ last past, or at any time afterwards, on which day he was outlawed in your county, at the suit of _____, in a certain plea of _____, as you have returned to our justices, (if in K. B. "us," adding, if by original, "wheresoever we shall then be in England") some time since, and by their oath cause the same to be extended and appraised according to the true value thereof, and what you find by that inquiry take into your hands and keep safe, so that you answer to our justices (if in K. B. "us") the values and issues thereof; and having so extended and appraised the same, what you shall have done therein make known to our justices at _____, at Westminster, in _____, (if in K. B. "to us," and adding, if by original, "wheresoever we shall then be in England") distinctly and plainly, under your seal, and the seals of those by whose oath you shall have made the extent and appraisement; and for that the said _____ conceals himself, and runs up and down from place to place in your county, in contempt of our justices, (if in K. B. "of us") and in prejudice of our crown, as we are informed: We command you that you take the said _____ wheresoever he is going in your county, as well within a liberty as without, and keep him safely, so that you may have him before our justices at Westminster, (if in K. B. by original "before us," adding, if by original, "wheresoever we shall then be in England") at the aforesaid time, to do and receive what our said court of the Bench (if in K. B. "before us") shall in this case determine; and have you there this. Witness, _____

(Signature.)

The answer of

_____ }
and _____ } Sheriff.

No. 4.
An inquisition.
Vide No. 2.

Middlesex, to wit. An inquisition indented, taken at _____, in _____, near _____, in the county aforesaid, the _____ day of _____, in the _____ year of the reign of our sovereign lord

George the Fourth, by the Grace of God, of, (&c.) before me — and —, sheriff of the county aforesaid, by virtue of the king's writ to me directed, and to this inquisition annexed, on the oath of —, (*here insert the jurors' names*) good and lawful men of my bailiwick, who being sworn and charged to inquire of all such matters and things as in the said writ are mentioned and contained, on their oaths do say, that —, in the said writ named, on the — day of — last, on which day he became outlawed, was, and on the day of taking this inquisition, is possessed, as of his own proper goods and chattels, of and in the several goods and chattels particularly mentioned and expressed in the schedule or inventory thereof, hereunto annexed, which said goods and chattels are worth, to be sold, the sum of £ — : All which said goods and chattels, I, the said sheriff, by virtue of the said writ, on the day of taking this inquisition, have seized and taken into his majesty's hands, according to the command of the said writ: And the jurors aforesaid, on their said oath, further say, that the said —, on the said — day of —, or at any time since, had not any lands or tenements, or, on the day of taking this inquisition, hath any other or more goods or chattels in my bailiwick which can be seized or taken into his majesty's hands, according to the command of the said writ. In witness whereof, as well I, the said sheriff, as the said jurors, have to this inquisition set our seals, the day, year, and place first above mentioned.

George the Fourth, (&c.) to the sheriff of —, greeting: Whereas, by a certain inquisition indented, taken at —, in —, near —, in the said county, the — day of — last, before you —, and —, sheriff of our said county, by virtue of our writ of *capias utlagatum*, under the seal of our court of King's Bench, to you the said sheriff directed, whereby we commanded you to inquire what goods and chattels, lands and tenements, —, late of —, in the county of —, had within your bailiwick, on the — day of — last past, or at any time afterwards, on which day he was outlawed, in the said county, at the suit of —, in a plea of trespass on the case, it was found by the oath of —, and other good and lawful men of the said county, that —, in the said writ named, on the — day of — last, on which day he became outlawed, and on the day of taking the said inquisition, was possessed as of his own proper goods and chattels, of and in the several goods and chattels particularly mentioned and expressed in the schedule or inventory thereof, hereunto annexed, which said goods and chattels were worth, to be sold, the sum of £ —; all which said goods and chattels, you the said sheriff, by virtue of our said writ, on the day of taking the said inquisition, did seize and take into our hands, as by the said writ and inquisition taken thereupon, transcribed into our court of Exchequer, and there remaining in the custody of our remembrancer, more fully appears; and, being desirous to be satisfied of the value of the said goods and chattels in the said inquisition mentioned, as is just, command you that you sell, or cause to be sold, the said goods and chattels, and every part thereof, for the best price that can be got for the same, and at the least, for the said sum of £ —, at which they were appraised as aforesaid, so that you have the sum of money arising by such sale before the barons of our Exchequer at Westminster, the — day of —, then and there to be paid in for our use, and that you make then and there distinctly and clearly appear to our said barons all that you shall do concerning the premises, and have

No. 5.
Writ of *venditioni
exponas*.

CAPIAS UTLAGATUM; FORMS.

you then and there this writ. Witness, _____ at Westminster, the _____ day of _____, in the _____ year of our reign, by the said transcript, and by the barons.

(Signature.)

No. 6.
The return to a
venditioni exponas.

By virtue of this writ to me directed, I have caused the goods and chattels in the schedule or inventory hereunto annexed, mentioned to be sold for the sum of £——, being the best price I could get for the same, which monies I have before the barons of the king's Exchequer at Westminster, on the day within mentioned, ready to pay to his majesty's use, according to the command thereof.

The answer of

_____, Esq. }
and } sheriff.
_____, Esq. }

To the right honourable the lords commissioners of his
majesty's Treasury.

The humble petition of _____

SHEWETH,

No. 7.
Petition to the
lords of the Treas-
ury.

That _____, late of the parish of _____, in the county of _____ being indebted to your petitioner in the sum of £—— your petitioner did, at his very great charge, in _____ last, prosecute the said _____ to an outlawry; and by virtue of a special *capias utlagatum*, directed to the sheriff of _____, several goods of the said _____ were seized, and found by inquisition to be of the value of £——, which goods were afterwards sold by the said sheriff, by virtue of a writ of *venditioni exponas*, at the same price and value they were so appraised at, and the money thereupon raised, still remains in the hands of the sheriff of _____.

That your petitioner's said debt, and the charges he has already been at in prosecuting the said outlawry, greatly exceed the sum so remaining in the hands of the said sheriff.

Wherefore your petitioner most humbly prays your lordships, that the money so levied as aforesaid may be paid over to your petitioner.

And your petitioner shall ever pray, &c.

(Plaintiff's signature.)

Other precedents are somewhat different in setting out the writs of capias utlagatum and venditioni exponas more formally, and in making prayer for a formal act to be done on the part of the attorney general; but the older Form seems brief, and to the purpose, and therefore I have preferred it, though a more modern one is inserted, No. 8.

To the right honourable, &c. (as in the last.)

The humble petition of _____

SHEWETH,

No. 8.

That _____, late of _____, being justly indebted unto your petitioner in the sum of £——, as acceptor of a bill of exchange, drawn by one _____, bearing date the _____ day of _____, 18——, your petitioner was obliged to outlaw him for the recovery thereof.

That a writ of special *capias utlagatum* having issued against him out of his majesty's court of King's Bench at Westminster, at the suit of your petitioner, an inquisition was taken thereon by the sheriff of Middlesex, whereby it appears, that certain goods and chat-

tels to the value of £—, mentioned in the said inquisition, were by the said sheriff seized and taken into his majesty's hands; which writ and inquisition being transcribed into his majesty's court of Exchequer at Westminster, a writ of *venditioni exponas* duly issued out of the said court, on which the said sheriff hath duly made a return, by which said return it appears, that the said sheriff had, by virtue of the said last-mentioned writ, sold the goods and chattels, in the return thereof mentioned, for the sum of £—, being the dearest and best price he could get for the same, and which monies he had before the barons of the king's Exchequer at Westminster, at the day in the said writ mentioned, ready to be paid to his majesty's use.

That as your petitioner has been at great expence in the said proceedings, and as his majesty is not interested, but the name of his said majesty only made use of by your petitioner for the recovery of his said debt;

Your petitioner, therefore, humbly prays your lordships that his majesty's attorney-general may be authorized to consent, on behalf of his majesty, that the sum of £— may be paid to your petitioner towards satisfaction of his said debt and costs.

And your petitioner shall ever pray, &c.

Whitehall Treasury Chamber, the ——— day of ———.

The right honourable the lords commissioners of his majesty's treasury are pleased to refer this petition to ———, esq. who is to consider the same, and to report to their lordships a true state of the petitioner's case, together with his opinion what is fit to be done therein.

No. 9.
Reference.

(Signature.)

(Court.)

(Title cause.)

No. 10.

——— of the parish of ———, in the county of ———, maketh oath, that ———, late of the parish of ———, in the county of ———, is justly and truly indebted to this deponent in the sum of £—, for work done and materials found by this deponent in his trade of a ——— for the said ———, for which debt this deponent did cause several writs successively to be issued out of his majesty's court of King's Bench against the said ———, and did use his utmost endeavours to get the said ——— arrested on each of the said writs; but this deponent not being able to procure any of the said writs to be executed, did cause the said ——— to be sued to an outlawry, and thereupon several of his goods to the amount of £— were seised into his majesty's hands, and sold by virtue of a writ of *venditioni exponas*, as this deponent is informed and believes: And this deponent saith, that his attorney's bill for fees and disbursements in outlawing the said ———, and causing his goods to be so seized and sold, doth amount to the sum of £—, as appears to this deponent by such bill, delivered to him by his said attorney, which bill this deponent, as far as he is capable of judging, believes to be just and reasonable; and this deponent also saith he hath paid the several following sums on account of such outlawry, and which sums are not included in his said attorney's bill, viz. To the sheriff's officer for executing the writ of *capias utlagatum*, £—; to two appraisers for appraising the said goods, the sum of £—; to the sheriff's officer the further sum of £—, in part of the sum of £—, which the said officer demands of this deponent for being ——— days in possession of the said goods in the de-

Affidavit of the plaintiff.
This form may be reduced to a simple affidavit of the debt and costs being due.

CAPIAS UTLAGATUM; FORMS.

fendant's house, for charges of removing the said goods, and for rent of a room wherein the said goods were deposited till sold, which said several sums of £—, £—, &c. do, together with this deponent's said debt of £—, amount unto the sum of £—, besides the fees to be paid in the Treasury and other offices in obtaining his majesty's warrant, which this deponent is informed and believes will amount to £— more.

Signed ———.

Sworn the ——— day of ———
before me, at my house, in ———.
(Date)

No. 11.
Certificate of the
clerk in court.

In the Exchequer.

These are to certify, that in ——— term, in the ——— year of the reign of his present majesty King George the Fourth, a transcript of an outlawry was returned and filed in this court against ———, late of ———, in the county of ———, *outlawed in Middlesex*, at the suit of ———, in a plea of trespass on the case, by which transcript it does appear that several goods and chattels of the said ——— were seized into his majesty's hands by ———, esq. and ———, esq. then sheriff of the said county of Middlesex, by virtue of a *special capias utlagatum* in the said transcript specified: *And I further certify*, that a writ of *venditioni exponas* has issued for selling the goods and chattels so seized, whereon the said sheriff hath returned that he hath sold the same for the sum of £—.

To the right honourable the lords commissioners of his majesty's treasury.

No. 12.
Report of the
solicitor to the
treasury.

May it please your Lordships,

In humble obedience to your majesty's commands, signified to me by ———, I have considered of the annexed petition of ———, setting forth that ———, late of the parish of ———, in the county of ———, being indebted to him in the sum of £—, he did, at a very great charge, in ——— last, prosecute the said ——— to an outlawry, and by virtue of a special *capias utlagatum*, directed to the sheriff of Middlesex, several goods of the said ——— were seized and found by inquisition to be of the value of £—, which goods were afterwards sold by the said sheriff by virtue of a writ of *venditioni exponas* at the same price and value they were so appraised at, and the money thereupon raised now remains in the hands of the sheriff of ———; that the defendant's said debt and the charges he has already been at in prosecuting the said outlawry greatly exceed the sum so remaining in the said sheriff's hands; the petitioner therefore prays your lordships that the monies so levied may be paid over to him.

And I do most humbly certify to your lordships, that I have received satisfaction as to the truth of all the allegations in the said petition contained, as well by the sight of the several records thereby referred unto, and a certificate of the said outlawries being transcribed into the office of his majesty's remembrancer of the Exchequer, signed by ———, one of the attornies of that office, as also by the affidavit of the petitioner; whereby it appears to me that the said ——— is indebted to the petitioner in the sum of £—, for ——— (*here state the cause of action*); and it appearing by the affidavit of the said petitioner that his said debt, with the several charges he had been already put to in outlawing the said ——— do exceed the sum levied by the sheriff, and as the petitioner must still necessarily

be put to a further expence, I am most humbly of opinion, that it may be proper for your lordships to send your warrant to his majesty's attorney-general, authorizing him to consent to an order of his majesty's court of Exchequer, for ——— and ———, the present sheriff of the county of Middlesex, paying over the said sum of £—— now remaining in his hands (after deducting the sheriff's poundage for levying the same, and other incidental charges) unto the petitioner, for his own use towards satisfaction for his said debt and costs, whenever a motion shall be made in the said court of Exchequer for that purpose.

All which is nevertheless most humbly submitted to your lordships' superior judgment.

(Date.)

(Signature.)

George R.

No. 13.
Warrant.

Whereas we are given to understand, that there is remaining in the hands of ——— and ———, the present sheriff of the county of ———, the sum of £——, for so much levied by him on the several goods belonging to ———, which were seized into our hands by virtue of an inquisition, taken by virtue of a writ of *capias utlagatum* issued out of our court of King's Bench against the said ———, at the suit of ———, for the recovery of a debt due and owing to him from the said ———. And whereas it further appears, by reports, certificates, and other proper testimonials, which the commissioners of our treasury have laid before us, that the debt due and owing to the said ——— from the said ———, together with the costs which he hath been at in carrying on the said prosecution against the said ——— for the recovery of the said debt, doth exceed the said sum of £—— remaining in the hands of the said sheriff as aforesaid; to the end, therefore, that the said ——— may have and receive some recompence and satisfaction towards his said debt and the charges he hath been at in suing for the same, our will and pleasure is, and we do hereby authorize and direct you to consent and agree, that so much of the said sum of £—— as doth or shall remain in the hands of the said sheriff (after deducting the usual poundage for levying the same) be paid over to the said ——— towards satisfaction of his said debt and costs accordingly, whenever he, by his counsel learned in the law, shall think fit to move our court of Exchequer for an order for that purpose, and we do also authorize and direct you to do, or cause to be done, such further or other acts as our said court of Exchequer upon such motion shall or may judge necessary for rendering our intentions herein most firm, valid, and effectual, and for so doing, this shall be your warrant. Given at our court at ———, the ——— day of ———, in the ——— year of our reign.

By his majesty's command.

(Signatures.)

To our trusty and well-beloved ———, our attorney-general.

George, (&c.) To ——— and ———, sheriff of our county of ——— (Middlesex), or to his under-sheriff, greeting: We command you that, laying aside all excuses, you obey, fulfil, and perform all and every matter and thing specified in an order of our court of Exchequer at Westminster, made in a cause in our said court depending between us and ———, outlawed at the suit of ——— upon an outlawry, the tenor of which order, for your fuller information therein, is hereto annexed, and this you are not to omit, under the penalty of one hundred pounds, which we shall cause to be levied on your goods

No. 14.
Subpoena to be served on the sheriff.

CAPIAS UTLAGATUM; FORMS.

and chattels, lands, and tenements, for our use, if you neglect this our command. Witness, ———, at Westminster, the ——— day of ———, in the ——— year of our reign. By the said order made the same day, and by the said barons.

(Signature.)

No. 15.
Order mentioned
in the *subpoena*
for the sheriff to
pay the money
over to the
prosecutor.

It is found in a certain book of orders of this Exchequer, to wit, amongst the orders of ——— term, in the ——— year of the reign of King George the fourth, in the ——— page, on the part of this remembrancer, as follows:

Between the king and ———, the ——— day of ———, 182—. Between the king and ———, outlawed at the suit of ———, upon an outlawry.

Upon the motion of ———, of counsel for ———, widow and administratrix of ———, deceased, informing the court that the said ——— having been prosecuted to an outlawry by the said ——— upon an action of trespass upon the case, in his majesty's court of King's Bench, a writ of outlawry thereupon issued against the said defendant under the seal of the said court, directed to the sheriff of Middlesex, by virtue whereof the said sheriff seized by inquisition several goods and chattels belonging to the said defendant, appraised at £——, and further informing the court that the said writ of outlawry and inquisition, being transcribed into this court, a writ of *venditioni exponas*, under the seal of this court, issued on the ——— day of ——— last, for selling the said goods, returnable the ——— day of ———, at which time ——— and ———, the present sheriff of Middlesex, returned the said writ, and certified that they had sold the said goods and chattels for the said sum of £——. It was therefore prayed by the said ———, that the said ——— and ———, or their under-sheriff, might forthwith pay to the said ———, administratrix of the said ——— prosecutor, or her order, the said sum of £——, towards satisfaction of the debt due from the said defendant to the said prosecutor; whereupon, and on hearing ———, his majesty's attorney-general, consenting thereto on behalf of his majesty, it is ordered by the court as prayed, the said sheriff first deducting out of the said £—— the usual poundage.

Signature.

To the right honourable the lords commissioners of his majesty's treasury.

No. 16.
Petition to the
lords of the trea-
sury for a lease
of the outlaw's
lands.

The humble petition of ———, surviving executor of the last will and testament of ———, deceased,

Sheweth,

"That ———, of ———, in the county of ———, esq. being indebted to your petitioner's testator in his life-time, by bond, in the penal sum of £——, of lawful money of Great Britain, conditioned for the payment of £——, with lawful interest for the same, from the ——— day of ———, which was in the year of our Lord ———. Your petitioner, as executor of the last will and testament of the said ———, deceased, did, at very great costs and charges, in the month of ———, which was in the year of our Lord ———, in due manner prosecute the said ——— to outlawry, and by virtue of a certain writ of special *capias utlagatum*, issued upon the return of the writ of *exigi facias* against the said ———, directed to the then sheriff of ———, esq. sheriff of the said county of ———, did return to the said writ of special *capias utlagatum*, to him directed, an inquisition taken at the dwelling-house of ———, called

or known by the sign of the — in —, in the said county, on the — day of —, in the — year of our Lord —, by which it was found, amongst other things, that the said — the outlaw, on the said — day of —, in the — year of our Lord —, on which day he was outlawed at the suit of your petitioner, as surviving executor of the last will and testament of the said —, deceased, was seized for the term of his natural life of and in all and singular the messuages, tenements, and hereditaments, with the appurtenances hereinafter particularly mentioned and expressed, being in the whole of the clear yearly value of — pounds of lawful money of Great Britain, beyond all reprises, that is to say, of and in a capital messuage or mansion-house, with the appurtenances, called —, and three other messuages or dwelling-houses, with the appurtenances thereunto adjoining, commonly called or known by the several names of —, and also of one water corn grist mill, with the appurtenances, called —, and also of and in two hundred acres of arable, meadow, and pasture land, or thereabouts, with the appurtenances, all which said premises were situate, standing, lying, and being, in the parish of —, in the said county, and were in the tenure, possession, or occupation of —, and that the said — was on the said — day of — seized of, or entitiled unto, in fee-simple, a free fishery of and through a certain river called —, in the parish of —, in the said county, and that the same was of the clear yearly value of £ — beyond all reprises, and was then let to — for that rent as tenant thereof to the said —. And that the said outlaw was not found in the bailiwick of the said sheriff, as by the return of the said writ of special *capias utlagatum*, now remaining of record in his majesty's court of Exchequer, amongst other things, may more fully and at large appear: And your petitioner further sheweth unto your lordships, that the said outlawry still remains in full force and effect, not vacated, superseded, reversed, or annulled, and that your petitioner's said debt and interest, together with the costs and charges which he has already necessarily been put unto in prosecuting the said — to outlawry, amount to a large sum of money, that is to say, to the sum of £ — and upwards; by reason whereof your petitioner hath been and is wholly prevented and hindered from administering the effects of the said — the testator, and fulfilling the duty and trust reposed in him as the surviving executor of the said —, deceased; wherefore, your petitioner humbly prays your lordships' favour and interposition, that by and with the consent of his majesty's attorney-general in this behalf obtained, a lease may be made to your petitioner by and from his majesty's court of Exchequer, whereby your petitioner may be enabled to levy, take, collect, and receive the issues and profits of the said outlaw's lands, tenements, and free fishery, so found by the said inquisition, to the value thereof respectively appraised, and extended till such time as sufficient thereout shall be made, collected, and levied, to satisfy your petitioner's said debt, interest, costs, and charges, or until such time as the said — shall cause the said outlawry, so had in due form of law against him, to be reversed or annulled. And your petitioner shall ever pray, &c.

CAPIAS IN WITHERNAM.

It is not probable that this writ will be frequently issued at this day, when boundaries are better defined, jurisdictions known and generally respected, and official duties more scrupulously executed; but yet it may be well shortly to explain its origin and use. Observation.

Issues, on what occasion.

In replevin the sheriff is bound to deliver to the plaintiff in replevin the distress or thing distrained, if it be in his bailiwick; but if it shall have been driven out of the county, he cannot make such delivery; this writ of *capias in withernam* therefore issues on the part of the plaintiff, directed to the sheriff to take the beasts of the distrainor in his bailiwick, and to detain them until he (the sheriff) is able to replevy to the distrainee, or plaintiff in replevin, his beasts, &c. according, &c. This writ also lies at the instance of the defendant against the plaintiff in replevin, as where a writ of *retorno habendo* is awarded, and the cattle be not forthcoming, other cattle of the plaintiff may be taken in reprisal, or in the place of those rightfully distrained. See below.

Meaning of the word.

Withernam, like many other Saxon terms, is not only found variously spelt, but with different meanings not very clearly defined. Its meaning is, "another distress." The student, desirous of tracing this word in its old dress, may consult the authorities cited 3 *Comm.* 149, n.

When it issue.

If the proceedings in replevin be in the county court, the *capias in withernam* cannot issue until an inquest be returned that the beasts were esloined or eloigned.

If the proceedings be in the courts above, the *capias in withernam* may issue on the return of *elongata* on the writ "*pro retorno habendo*" also, as observed above; and if the sheriff shall have returned upon the *pluries, quod averia elongata sunt*, a writ of *scire facias* lies against the pledges; and if they are returned to have nothing, a writ of *capias in withernam* lies against the plaintiff himself.

Is mere process.

This writ of *capias in withernam* is but mere process; *Moor v. Watts*, 2 *Salk.* 581, and the cases cited in the margin 582; and if the sheriff return that the defendant hath not any thing, &c. to the writ of *withernam*, the plaintiff may sue out a *capias in withernam* against the defendant, and proceed to outlawry; *New Nat. Br.* 166; there is no other remedy in the court below, unless by issuing an *alias* and *pluries capias in withernam*, and so on *in infinitum*.

The cattle taken *in withernam* must not only be according to the number, but also according to the worth and value of those first taken; and they may be worked reasonably, or milked. They cannot, however, be replevined; as to which see a curious note, 3 *Comm.* 169; but they will, on motion, be delivered back and restored to the owner, on his payment to the plaintiff of all damages, costs, and expences. 3 *Lill. Abr.* 690.

PRACTICAL DIRECTIONS.

This writ is made out by the filazer in either court, on precipe containing the county, names of parties, cattle eloigned, &c. pay —; seal 7d.

FORM.

Form of writ of *capias in withernam*.

George the fourth, &c. To the sheriff of — greeting:
Whereas — was summoned to appear in our court before our justices at Westminster, to answer — of a plea wherefore he took the cattle of the said —, and unjustly detained the same against sureties and pledges, as he says, and the same — af-

terwards, in our same court, made default in the same plea; whereupon it was then and there considered that the same ——— and his pledges of prosecution, should be in mercy, and that the said ——— should go thereupon, without delay, and that he should have a return of the cattle aforesaid; whereupon by our writ we commanded you that you should cause to be returned the cattle aforesaid to the said ——— without delay, and the same at the complaint of the said ——— you should not deliver without our writ which of the aforesaid judgment should make express mention, and in what manner you should have executed our said precept, you should make manifest to our justices at Westminster, on ———, (*the return day of the retorno habendo*) last past, on which day you returned to our said justices at Westminster, that before the coming of the aforesaid writ, the cattle aforesaid were eloigned or conveyed away to places unknown to you by the said ———, so that the cattle aforesaid to the said ——— you could not cause to be returned, as by the said writ you were commanded: *Therefore*, we command you that of the cattle of the said ——— to the value of the cattle before taken in *withernam*, you take and deliver them to the said ———, to be held by him until the said cattle before taken, you can cause to be returned, and put by sure and safe pledges the aforesaid ——— that he be before our justices at Westminster, on (*the return day*) to answer as well to us of the contempt, as to the said ——— of the damages and injuries to him in that behalf done. And in what manner this our precept you shall execute make appear to our justices at Westminster, at the aforesaid return, and that you have there the names of the pledges and this writ. Witness, &c, on ———, &c, in the ——— year of our reign.

See title REPLEVIN.

CA. SA. The abbreviation of CAPIAS AD SATISFACIENDUM, which title see.

CAPIATUR.

Of this, as of many other heads of former practice, it might only now be said to be obsolete; but in *Hacket v. Marshal*, 1 Str., 313, after verdict, an objection was made, when a *capiatur* was added against an infant, but it was held to be cured by statute 16 & 17 C. II. c. 8.

For certain injuries by force, a fine was anciently payable to the king by the defendant, and by this word "*capiatur*," let him be taken, *until such fine be paid*, the consideration of the court, in relation to such liability, was signified; whereupon there issued the *capias pro fine*, but stat. 5 & 6 W. & M. c. 12, extinguishes this immediate liability to the king, on the part of the defendant; the sum of 6s. 8d. being paid by the plaintiff to the proper officer, and on taxation of costs allowed him against the defendant.

CARRYING IN THE ROLL. See title DOGGETT.

CASE. *Action on the Case.*

The law has not defined the nature of every civil wrong which men may experience at the hands of each other. The shades of injury are infinitely too nice, too various, and, above all, too illimitable, to admit of precise and legal definition, and of appropriate redress. Whatever a long course of civil society and of

Observation.

uninterrupted jurisprudence may ultimately promise and perform to mankind, no such perfection of law is yet visible in the civilized world; the utmost that in the name of law can be done in behalf of society is, to take care that men suffer as little as possible at the hands of each other wrong, without redress.

The phrase "action on the case," is of itself of obvious and most comprehensive import. From the very words we gather, that where ever the commission of a civil injury is intelligibly told, the law has provided some redress proportioned to the injury, to be obtained by him who has experienced it.

If, therefore, neither law nor practice hath expressly and in terms defined the nature of the action to be instituted for an injury sustained without force, such action may be brought "on the case" itself; that is, on a legal and recognized form of statement of the injurious circumstances constituting or occasioning such injury.

Where it lies for words.

This action on the case must be, then, of very general use; it lies for words written or spoken, occasioning injuries to a party in his reputation, office, or trade; or which may occasion either his loss of preferment in marriage or service, or which may expose him to punishment, or forfeiture of life, limb, liberty, or estate, or may occasion his disinheritance, or by which it may be evident he has experienced special or particular damage.

In this action, when brought for words, it will be necessary that whether written or spoken, and occasioning mischief to the party, they should be plainly and perspicuously stated and set forth; the manner of speaking them; when and where spoken; before whom; the damage incurred, and how; whether in respect of credit, or otherwise; and all the aggravating, or what have been deemed aggravating, circumstances, should be stated.

As a general summary of the doctrine of action upon the case for words, I shall insert the following observations, made by Lord Chief Justice De Grey, on giving judgment in the case of *Onslow v. Horne*, 3 *Wils.* 177; the principles there recognized may very much assist in advising on the statement of a client's case, whether or not it be fit ground for action.

"As far as I can collect from determinations in actions for words, there seems to be two general rules whereby courts of justice have governed themselves, in order to determine words spoken of another to be actionable.

"The first rule is, that the words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanor, and the charge upon the person spoken of, must be precise. In the case of *Turner v. Ogden*, 2 *Salk.* 696, the words are 'Thou art one of those that stole Lord Shaftsbury's deer,' held not actionable; for though imprisonment be the punishment in those cases, yet per Holt, C. J. it is not a scandalous punishment; a man may be fined and imprisoned in trespass; for, said he, there must not only be imprisonment, but an infamous punishment. I think there Holt carries it too far as to precision; for it is laid down in *Finch's Law*, 185, if a man maliciously utter any false slander to the endangering one in law, as to say, 'He hath reported that money

is fallen; for he shall be punished for such report.' Here is the case of a crime, and the punishment not infamous; and yet Finch seems to say an action lies for these words.

"The second general rule is, that words are actionable when spoken of one in any office of profit, which may probably occasion the loss of his office; or when spoken of persons touching their respective professions, trades, and business, and do or may, probably, tend to their damage.

"I think for imputation of ignorance to one in a profession or an office of profit, an action will certainly lie; though per Holt, 2 Salk. 694, for imputation of ignorance to a justice of peace, being only an office of credit, an action will not lie. Holt carried it no farther than ignorance as to a justice of peace. 'There must be some certain or probable temporal loss or damage to make the words actionable; as to say, a woman is a whore in London, where she is subject to be whipt for whoredom; or to impute to a woman want of chastity, who holds an estate *dum sola et casta fuerit*, 1 Lev. 134; but to impute to any man the mere defect or want of moral virtue, moral duties or obligation, which render a man obnoxious to mankind, is not actionable.'

This action lies also against a carrier, upon the custom of England, as above mentioned; but who, strangely enough, as I venture to think, has been allowed so to modify his contract as to get rid of the custom altogether. The frauds or the vexations originating with a relaxation of the wholesome old law, by which carriers were held liable generally on the custom, have become very numerous, and call for legislative interference*.

Where it otherwise lies.

Also against an innkeeper for goods stolen in his house. So, also, for deceit in contracts, as on the goods not answering to the warranty; or, where the article is sold without warranty as good, and it be not so; but it may be observed, that the commencement of the special action on the case is very often subject-matter for great consideration and reference to the higher legal authorities.

See title ASSUMPSIT; also *Com. Dig.* tit. ACTION. Also title LIMITATION OF ACTIONS, TABLE OF LIMITATION OF ACTIONS.

Many other observations may arise as to some points affecting this title, particularly as to whether the damage sought to be recovered were consequential or immediate; but in practice these points are generally, if not always, referred to the consideration of those who are to draw and settle the pleadings. Amongst the great improvements which have taken place in our latter jurisprudence, Sir William Blackstone mentions the extension of the remedial influence of the equitable writ of trespass on the case, according to its primitive institution by King Edward the First, to almost every instance of injustice not remedied by any other process.

* I perceive with satisfaction that since writing the above, some late decisions may teach the public that the responsibility of carriers is working

round to its ancient character of general liability to all losses, except those occasioned by the act of God, or the king's enemies.

CASSETUR BILLA, VEL BREVE; PR. DI.; FORMS.

CASE. *Directed out of Chancery.*

Upon a case directed out of Chancery, the court [C. P.] will not solve any questions that are not expressly put in the case. *Morgan v. Horseman*, 3 Taunt. 241.

See title SPECIAL CASE, *post*.

CASSETUR BILLA, CASSETUR BREVE.

What.

The phrase imports "that the bill or the writ be quashed." When the plaintiff cannot prosecute his writ or bill with effect against the defendant in consequence of some allegation on his the defendant's part, and the plaintiff is therefore desirous of avoiding any future proceeding in that suit, he enters on the roll a certain form of judgment, called a *cassetur billa, vel breve*, the effect of which is to quash his own bill or writ, and he then avoids the paying costs to the defendant, and enables himself to commence a new process.

After this entry declaration by-the-by delivered.

This practice now not frequent.

Having made the entry, it appears that during the same term the plaintiff may deliver a declaration, *by the bye*, against the defendant. *Miller v. Andrews*, 5 T. R. 634.

The plaintiff being allowed to take out a summons to amend on payment of costs, the entering a *cassetur billa, vel breve*, is not often done.

In K. B. as well as in C. P. the whole declaration should be entered on the roll, as well as a memorandum of the term and plea. Three standard books of practice mention only the entry of the memorandum and plea being necessary, and Richardson, I do not find mentions the entry of the *cassetur billa*.

PRACTICAL DIRECTIONS, K. B.

Enter on a roll the term the declaration is delivered, and also the declaration without warrants, (see observation above), and at the foot thereof, on a new line, enter the defendant's plea; then add the judgment of cassetur billa. See FORMS, subjoined; carry roll to the clerk of the judgments; pay docket, &c. 4d. per sheet; the roll is marked by the master at the same time; thus completed, it is to be filed in the Treasury Chamber, K. B. at Westminster.

Doggett the roll. See title DOCKET.

FORMS.

No. 1.
Form of judgment of cassetur billa.

[After the entry of the term, the declaration, and the defendant's plea, as mentioned above, say.] "And hereupon the said ———, (the plaintiff) says that he cannot deny the matter contained in the said plea above pleaded by the said ———, (the defendant) but admits the same to be true; therefore, it is considered by the court of our said lord the king, before the king himself now here, that the said bill (or writ) of the said ———, be quashed," &c.

I have purposely left this precedent thus concise; upon such admission of the plaintiff of the truth of the defendant's plea appearing upon record, it may seem sufficient to state the judgment of the court, that the bill be thereupon quashed.

No. 2.
Another form.

And hereupon the said ———, inasmuch as he cannot deny the several matters above pleaded by the said ———, but admits the same to be true, prays judgment, and that the said bill (or writ)

of the said ——— may be quashed, to the intent that the said ——— may exhibit a better bill (*or sue out a better writ*) against the said ———; therefore it is considered by the court of our said lord the king, before the king himself now here, that the said bill (*or writ*) of the said ——— be quashed, &c.

PRACTICAL DIRECTIONS, C. P.

The roll is to be obtained at the prothonotary's office, and enter thereon the whole of the declaration, with the plea, and at the foot of the plea the cassetur breve is to be entered. See FORM subjoined.

Carry the roll to the prothonotary's office, and docket it; pay 8d. per folio.

FORM.

And hereupon the said ——— says, that he cannot deny the truth of the matter of the said plea by him the said ———, above pleaded to his said writ; therefore, it is considered by the court here, that the said writ of the said ———, (*plaintiff*) be quashed.

Form of the entry of the cassetur breve C. P.

CAUSE, *Entering Cause*. See title ENTERING CAUSE.

CEPI CORPUS. The term by which the return of the sheriff is now known, that he hath taken a defendant, "I have taken the body."

CERTIFICATE. *Attorney's Certificate*.

See statute 37 G. III. c. 90. s. 26. 28.

By this statute the attorney is to "deliver in to the commissioners of the stamp duties, or to their officer appointed for that purpose, at the head office of stamps in Middlesex, a paper or note in writing, containing the name and usual place of residence of such person, and thereupon, and upon payment of the duties according to the place of his residence, every such person shall be entitled to a certificate duly stamped, to denote the payment of the said duties, which certificate the said commissioners shall cause to be immediately issued, under the hand and name of the proper officer, in such form as they shall devise. And every certificate issued by virtue of this act, between the first day of November in every year, and the end of the then next Michaelmas term, shall bear date on the second day of November in such year; and every certificate issued at any other time shall bear date on the day on which the same shall be issued; and every such certificate shall cease and determine on the first day of November then next following."

To whom the attorney is to deliver his name, &c.

On payment of the duties is to be entitled to certificate.

When certificates to be dated 2d November.

When to bear date any other time. Duration of the certificate

Where certificate to be entered.

By the 27th section of the same statute, every certificate so to be obtained as aforesaid, shall be entered in one of the courts in which the person described therein shall be admitted, and inrolled with the respective officer or officers of the said courts, appointed by the 25 G. III. c. 80, (*these are the chief clerks of K. B. or his deputy, and the clerk of the warrants in C. P. or his deputy*) to grant certificates of inrolment or admission within the time therein-before prescribed, or before such person shall be permitted to practice as aforesaid; and the said respective officers shall from time to time, upon payment of the fee of 1s. enter, in alphabetical order, the names of the persons described in such respective certificates, together with the places of such their residence as aforesaid, and

Alphabetical list to be made.

CERTIFICATE, *Attorney's Certificate*; STATUTES; CASES.

the respective dates of such certificates, in books or rolls to be prepared for that purpose, to which books or rolls, in the said courts respectively, all persons shall and may, at seasonable times, have free access, without fee or reward.

Practising without certificate.

By section the 80th, "if any person shall, in his own name, or in the name of any other person or persons, sue out any writ or process, or commence, prosecute, carry on, or defend, any action or suit, or any proceedings in any of the courts aforesaid, for or in expectation of any gain, fee, or reward, or shall do any act in any of the said courts as an attorney of such court, without obtaining a certificate in the manner before directed, or without entering the same in one of the courts aforesaid, wherein such person shall be admitted or enrolled as an attorney, &c. or shall deliver in to any person at the said head office any account, containing a place of residence, as the place of his residence, contrary to the said act of the 25 G. III. with intent to evade the payment of the higher duties, every such person shall, for every such offence, forfeit and pay 50*l.* and shall be made incapable to maintain any action at law or equity for his fees, &c.

Or without entering the same.

Or delivering an improper account of residence.

Subject to the penalty of 50*l.*

Persons not taking out their certificate for a year incapacitated.

A further legislative provision respecting the certificate is made by section 31, whereby it is enacted, that every person sworn and inrolled in any of the said courts as aforesaid, who shall neglect to obtain his certificate thereof in the manner before directed for the space of one whole year, shall from thenceforth be incapable of practising in his own name, or in that of any other person, in any of the said courts, by virtue of such admission, entry, and inrolment; and the admission, entry, and inrolment of such person in any of the said courts shall be from thenceforth null and void; provided always, that nothing thereinbefore contained shall be construed to prevent any of the said courts from re-admitting any such person, on payment to the commissioners of the duty accrued since the expiration of the last certificate obtained by such person, and such further sum of money, by way of penalty, as the said court shall think fit to order and direct.

Unless re-admitted on certain terms.

Actions are to be commenced within six calendar months, and only in the county where the cause of action arose; if not convicted, defendant to recover treble costs.

Cases.

The acts of parliament affixing the duty payable on and regulating the granting of the certificate, having been thus briefly stated, it may be proper to mention the few decisions that have been ruled in relation to the certificate.

Whether common informer may sue for penalty.

Whether a common informer may or may not sue for the penalty incurred for practising without taking out the certificate, has experienced contrary decisions; the case of *Barnard v. Gosling*, 2 *East*, 569, ruling that a common informer could not sue under that act for such penalty; but the case of *Davis v. Edmonson*, 3 *B. & P.* 382, cited in the case of *Barnard v. Gosling*, in error in the Exchequer Chamber, 1 *New Rep. C. P.* 245, was held to determine that a common informer might sue for such penalty under that act; and it was also ruled, that two cannot be sued together as for one offence in not having obtained and entered their certificate.

To a report of this case the learned editor subjoins a *quære*, whether it be not bad to sue under the statute for not having *obtained and entered* a certificate, without distinguishing for which of those two omissions the penalty has been incurred.

It seems clear that where two attorneys carry on business in partnership together, *either* of them is liable to the penalties of the above act, for practising as an attorney without entering the certificate, even though it should appear that the attorney sued had no interest in the particular suit, for the prosecuting which the penalty was claimed to be incurred. *Edmonson v. Davis*, 4 *Esp. Ca. Ni. Pri.* 14; and it seems clearly settled that the 25 G. III. c. 80, (the first certificate act) does not extend to prevent an attorney prosecuting a suit in the county court, by a virtue of a writ of *justicies*, for more than 40s. *Cross v. Kaye*, 6 *T. R.* 663.

For some years a person omitted to take out his certificate, and, under the 31st clause of the 37 G. III. c. 90, applied to be re-admitted; he made an affidavit stating the period of his admission, and that of ceasing to take out his certificate; the affidavit then stated that he intended going into trade, and discontinued the taking out the certificate solely for that reason, and not from fear of any censure, &c. The court required this affidavit to be made, for the purpose of obtaining information as to what the attorney had been doing in the mean time, and it now observed, that the affidavit did not state in what manner he had employed his time. Mr. Espinasse stated that he had been doing nothing. The court said, that the act required that some penalty should be fixed, and it was ruled that the attorney should pay the amount of the duty 5*l.*, and also 5*l.* by way of penalty. *Ex parte Saunders*, 2 *Smith*, 154, in another case, mentioned by Mr. Tidd to have occurred, *Ex parte Jones*, M. 46 G. III. a rule was drawn up on notice to the solicitor to the commissioners of stamp duties, and upon payment of the duty accrued since the expiration of the last certificate, together with the penalty or fine, which is usually 20s.*

Either of two partners is liable to be sued.

Act does not extend to prevent attorney prosecuting in county courts.

Application for re-admission.

* It may be observed, that as to what may or may not be considered as *arrears* of duty, may be questioned. While a person acts as an attorney, he is subject to a certain duty, and such duty is due from him for so acting. The duty, if withheld, would be an *arrear*; such *arrears* therefore, it is submitted, may only be those which were incurred while the attorney continued to act without paying the duty. If the express case had been determined, I should hardly have presumed on these observations. It is very easy to state circumstances, where it might be deemed extremely strict to impose upon a person applying to be re-admitted, the payment of every year's duty which would have accrued due, provided such person had continued to practice. Sickness, disarranged state of his affairs, or of his mind, necessary business abroad, might have rendered it, unless the statute should be thought imperative, imprudent to con-

tinue to pay up the yearly sum imposed on the certificate of the practising attorney. It may appear, that some equitable reasoning of this description influenced the decision in the case cited above from *Smith's Rep.* for the sum mentioned to be paid as *arrears* is short of what would be deemed *arrear*; provided the yearly duty were to have been held due, it would appear that three years duty would have been due; namely, for 1802, 1803, and 1804, whereas the application is reported to have been granted on payment of 5*l.* only as *arrears*. This decision is by no means consonant with the subsequent one, mentioned 1 *Tidd*, 73. It is with great satisfaction, the editor observes, that the courts seem, by later decisions cited above, to have adopted views as to this question similar to those expressed in the above. See *Ex parte Nicholson*, 6 *Trent*, 408. *Ex parte Richards*, 1 *Chit. R.* 101. And it appears

Cases on re-admission.

But it has been held, that an attorney who has ceased to practise after the passing of stat. 25 G. III. c. 80, and before the operation of 37 G. III. c. 90. s. 31, had commenced, may be re-admitted without paying any penalty or arrears of duty. *Ex parte Scrope*, 2 *Taunt.* 398.

And now it seems that an attorney would be re-admitted, without fine or payment of arrears, on affidavit, that for two years he had been prevented by illness from practising. *Ex parte Richards*, 1 *Chit. R.* 191.

Where attorney has continued to practise after his certificate has expired, through inadvertence of a clerk employed to obtain certificate, the court will re-admit him without a term's notice. *Ex parte* —, *Id.* 163. And see *Ex parte Dent*, 1 *B. & A.* 189.

Court will not dispense with necessity of term's notice on re-admission, on ground of pecuniary embarrassments and illness, unless attorney has discontinued practising during the interval. *Ex parte Bartlett*, 1 *Chit. R.* 207. and 646. But see *Ex parte Vaughan*, E. 45 G. III. K. B. 1 *Tidd*, 72. *Id.* 83. where the attorney had discontinued to practice in the interval.

If an attorney of C. P. has entered into trade, and discontinued to practise for twelve years, the reasons for his quitting such trade must be satisfactorily explained before he can be re-admitted. *Ex parte Mayer*, 5 *J. B. Moore*, 141.

Attorney will not be re-admitted without term's notice, on ground that he has been abroad for some time, and that agent neglected to take out his certificate during his absence. *Ex parte Watson*, 1 *Chit. R.* 201. and 646.

Affidavit to re-admit an attorney who had not taken out his certificate for more than a year, must state in express terms, that he had not practised in the interval. *Ex parte* —, *Id.* 646.

Where an attorney applied to be re-admitted, after omitting to take out his certificate for two years, it was held, that in order to admit him without payment of arrears of duty, he must distinctly swear, that he had not practised during the interval. *Ex parte* —, *Id.* 646.

An attorney having practised for two years without having taken out his certificate, in consequence of the negligence of his agent, was re-admitted without sticking up the usual notices, on paying the arrears of duty. *Ex parte Davies*, *Id.* 673. and see 692.

So where through neglect of agent. *Ex parte Platts*, *Id.* 692; but the attorney must in this case pay up all arrears and fines. *Ex parte Leacroft*, gent. 4 *B. & A.* 90. And see, in re James Winter, 8 *Taunt.* 129. But, the rule for re-admission was conditioned for the attorney-general's consent being obtained.

Attorney re-admitted without payment of arrears of duty after ceasing to practise for five years, although the affidavit did not state, that he was under no apprehension of complaint against him. *Ex parte Smith*, 1 *Chit. R.* 692.

to have been ruled generally, C. P. that an attorney who has ceased to practise may be re-admitted without paying arrears of duty. *Ex parte Cunningham*, 1 *Bing.* 91.

An attorney, who had not practised on his own account since his last certificate expired, may be re-admitted without paying any fine or arrears of duty. *Ex parte Clarke*, 2 *B. & A.* 314.

And an attorney who had taken out his certificate for one year, but had never practised afterwards was held entitled to be re-admitted without fine. *Ex parte Davis*, *Id.* 729.

An attorney may be re-admitted on the last day of term, when notice has been up all the term. *Ex parte —*, 1 *Chit. R.* 557.

An attorney had sent the money regularly for his certificates for three years by his clerk, who misapplied the money, and failed to purchase them. The court, upon application for his re-admission as an attorney, granted a rule absolute in the first instance, *conditioned* for the production of the attorney-general's consent. In *re James Winter*, 8 *Taunt.* 129.

To prove that a writ issued in a particular cause, it is not sufficient to prove the *precipe* by the filazer's book, and to give notice to the party to produce it; it should be shewn that after the return the Treasury was searched, and no such writ found, and that it was in the party's hands, who had notice to produce it. *Edmonstone v. Plaisted*, 4 *Esp. Ni. Pri. Rep.* 160.

Note as to evidence in an action for penalty for practising without certificate.

And in the same cause also it was ruled, that under an averment in a declaration for penalties "that the defendant had filed a declaration in a certain suit then depending," it is sufficient evidence to produce a declaration out of the office, indorsed in the defendant's hand-writing, as to the time for pleading, without shewing a suit otherwise commenced. *Id.* 161.

PRACTICAL DIRECTIONS.

If one be desirous of re-admission, the course is to insert the regular notice in the books of the judges of the court, and to affix the same on the outside of the court at Westminster Hall. Where he needs not affix the name, see Ex parte Davies, 1 Chit. R. 673. 692. The following term he moves on the special circumstances, to be stated in an affidavit, to be re-admitted. See FORM below. The court either grants a rule for the admission at once, or, if the facts seem to require it, a rule to shew cause is granted, and the proper parties are directed to be served. Thus where the party swore, that since his having ceased to practise, he had held an office, not a legal one, in the Excise, the court made a rule Nisi to be served on the solicitor of the Excise, and upon a very strict affidavit of the service of that rule, and no objection being made on the part of the Excise, the court made the rule for the re-admission absolute. A copy of this rule is then to be served on the solicitor of the stamp-office: the arrears paid, the attorney applies to be re-admitted as on application for admission at first.

FORMS.

N. The notice to be entered and affixed, as mentioned above; as also the affidavit of such entry, &c. may be referred to under the head ATTORNEY.

Day, &c.

Ex parte } Upon reading the rule, made in this cause on ———, }
 ——— } in ———, and sheriff of ———, it is ordered that
 the said ——— be re-admitted an attorney of this court, upon payment of arrears of duty, and 20s. by way of fine.

Form of a rule absolute for the re-admission of an attorney.

No general Form for this purpose can be framed, so as to suit all circumstances; but the following heads are submitted as being proper, viz.: The deponent may state his having been duly admitted; when, why he ceased to practice, or take out his certificate; that he did not

Affidavit for re-admission is without fine, &c.

CERTIFICATE, &c. CERTIFICATE, *Judge's Certificate.*

take out the same from any desire to defraud his Majesty's revenue; nor from apprehension of any animadversion by the court, or to delay creditors: that the deponent had not incurred any penalties: that, in the interval, he hath not by himself, or in the name of any other person, practised as an attorney or solicitor; nor, directly or indirectly, derived any profit or emolument as such. The affidavit may then go on to verify the usual notices, &c.

For a form of affidavit, specifying many peculiar circumstances, see 1 *Chit. R.* 102.

CERTIFICATE. *Of Marshal or Gaoler, or his Copy of Causes.*

This certificate is necessary to be obtained in many cases.

See titles ALLOWANCE TO PRISONER, *ante*, pages 34 to 40. PRISONER.

It is to be obtained on application at the prison, and is granted of course. It is more or less full, according to the occasion for which it may be required. A Form is subjoined.

FORM.

Gaoler's certificate of causes applies against a prisoner.

Clause added where prisoner is supersedeable for want of declaration.

I _____, keeper of the county gaol of _____, certify that _____ was, on the _____ day of _____, in the year of our lord _____, (or last) committed to the county gaol of _____, by virtue of a writ of a *capias ad respondendum*, issuing out of his majesty's court of the Bench, at Westminster, returnable in _____, at the suit of _____, in a plea of _____. (If there be more causes than one, they are here to be enumerated, and the respective nature of the writs for detention is to be set forth as above). And I do further certify, that since the said commitment there has not been delivered to me, or my turnkey, any declaration against him the said _____, at the suit of the said _____, or any other person whatever, and that no writ of *habeas corpus* has been brought for the removal of the said _____. Witness my hand, this, &c.

Witness

(Signature.)

For the affidavit of the gaoler's signature, see *ante*, 40.

CERTIFICATE. *Judge's Certificate.*

The judge who tries a cause is authorized by several statutes in certain cases to certify, so as to decide when the party or parties shall or shall not be entitled to costs; and it is of great importance that many of these certificates should be obtained at the time of trial. See 3 *Campb. N. P. R.* 316.

In the case of seizures by the customs or excise, the judge has power to certify a probable cause of seizure; in which case the plaintiff will recover only nominal damages and no costs, nor will the defendant be imprisoned, nor be fined more than 1s.

So, in order to restrain plaintiff from recovering costs in other cases of verdict of small damages. Statute 43 *Eliz. c. 6*, by stat. 11 & 12 *W. III. c. 9*, extended to Wales and the counties palatine, was enacted.

A judge's certificate, under 43 *Eliz. c. 6*, is sufficient to deprive a plaintiff of costs, notwithstanding the action be brought under stat. 11 *G. II. c. 19. s. 19*, by which, in case the plaintiff obtains a verdict, he is entitled to full costs. *Irwine v. Reddish*, 5 *B. & A.* 796.

As to recovery of double costs by justices, mayors, &c. given by the 7 J. I. c. 5, a power is conferred on the judge before whom the cause was tried, to allow to them double costs; this is done by his certificate.

By stat. 22 & 23 C. II. c. 9, extended to Wales and the counties palatine; by stat. 11 & 12 W. III. c. 9, the plaintiff in certain cases is *deprived* of costs, *unless* the judge certify under his hand upon the back of the record, so as to entitle him to costs.

So also the judge's certificate under stat. 8 & 9 W. III. c. 11, is necessary to entitle a plaintiff in certain cases to costs; and where a defendant would otherwise in certain cases be entitled to costs, the same act places it in the power of the judge to deprive him thereof by his certificate.

The granting of a certificate under this statute, seems to be discretionary in the judge, who may certify or not, according as it appears to him that the trespass was wilful or not; and the judge having declined to certify, in a case where notice was given by the plaintiff's wife to the defendant not to enter the *locus in quo* in his cart, there being no road there; notwithstanding which, the defendant persisted in going on in the exercise of a disputed right of common in an adjoining inclosure of the plaintiff, which right was found for the defendant on a justification pleaded, the court refused to interfere. *Wood v. Watkins*, H. 43 G. III. K. B. 2 *Tidd*, 983.

The certificate under 8 & 9 W. III. c. 11. s. 4. needs not be obtained at the time of trial. *Anon.* MS. H. 4 G. IV. K. B. See title COSTS.

So also in certain cases in replevin, the judge is empowered to certify, under stat. 4 Ann. c. 16, so as to entitle an avowant to costs.

So also under the Welch judicature act, 15 G. III. c. 51. s. 2, a like power is conferred on the judge.

For certificate under stat. 24 G. II. c. 18. see title JURY, SPECIAL JURY.

The LORD CHANCELLOR also very often requires the opinion of the judges upon a question of law; to obtain this a case is framed containing the admissions on both sides, and upon these the dry legal question is stated; the case is then submitted to the judges, who, after hearing counsel, transmit to the chancellor their opinion. This opinion, signed by the judges of the court, is called their *certificate*. See 3 *Comm.* 453.

As to judge's certificate to Lord Chancellor.

CERTIFICATE. *Trial by Certificate.*

Where a question in a cause may be raised as to whether a person were resident in any of our colonies, the certificate of the governor might be admitted as evidence of that fact. 3 *Comm.* 334.

It appears also, that the customs of the city of London are to be certified by the mouth of the recorder. And if the recorder have once certified a custom, the court are in future bound to take notice of it. There seems to be some ground to doubt, whether such certificate by the mouth of the recorder will be allowed, where the

The various cases of certificate. Residence in a colony. Custom of London.

Quare.

CERTIFY THE RECORD, &c. PR. DI.

As to citizen of London.

As to cognizance claimed by the universities.
Exception.

Ecclesiastical matters.

Custom and practice of the courts of law.

corporation itself is a party; for, in the case of *The King v. The Mayor and Aldermen of London*, 1 *T. R.* 493, 425, it was stated *arguendo*, and not denied, that the recorder cannot certify in any question in which the corporation is party, and *Hob.* 85, recognized in *Jenk.* 21, was cited.

So, also, as to whether a person be a citizen of London; it is said, that the certificate of the sheriffs of London shall in certain cases be the final trial, 1 *Inst.* 74. So, also, where the chancellor of either university claims *cognizance*; the certificate of the chancellor under seal is allowed to determine the question; but where the issue is between two parties themselves, the trial shall be by jury. *Ibid.* 335. 2 *Rol. Abr.* 583.

Marriage, bastardy, excommunication, and orders, are tried by the bishop's certificate; so, also, other ecclesiastical matters.

Customs and practices of the courts of law are to be tried by the certificate of the proper officer of the respective courts; and what return was made on a writ by a sheriff or under-sheriff shall be only tried on his own certificate. 9 *Rep.* 31.

For a summary of the law concerning *certificate*, see 3 *Comm.* 334, and the authorities there cited.

For certificate of bankrupt, see title **BANKRUPT**.

See further as to *certificate*, title **COSTS**.

CERTIFICATION OR CERTIFICATE OF ASSIZE.

What.

A term applicable to a writ granted for the re-examining or re-trial of a matter passed by assize before justices. *F. N. B.* 181. 3 *Comm.* 389.

The summary motion for a new trial has entirely superseded the use of this writ, which was one of the means devised by the judges to prevent a resort to the remedy by *attaint* for a wrong verdict; see title **ATTAINT**, *ante*, page 113. This remedy, it is observed, *Comm. ubi supra*, "shews the ignorance and ferocity of the times."

CERTIFY THE RECORD. *Rule to certify Record.*

What.

A term, by which a rule in error is properly known. For the period at which the rule is to be obtained, see title **ERROR**.

The title of the rule is best founded on the tenor in which it runs, which is to "certify the record;" but the same rule is frequently known in practice by the title of a rule to transcribe: thus *Imp. K. B.* mentions this rule under the title of a rule to "certify" the record; but in his *C. P.* it is mentioned under a title of a rule to "transcribe." Mr. Tidd does not make any distinction.

PRACTICAL DIRECTIONS.

If bail shall have been given in the prosecution of the writ of error, and it be completed; or, if bail be unnecessary, on the return of the writ of error, the defendant in error may apply at the clerk of the errors K. B. in case the writ of error be brought in the Eschequer Chamber on the judgment in K. B. for a rule for the plaintiff in error to certify the record; pay 2s.; if the writ of error shall have been brought on a judg-

CERTIFY THE RECORD, Pr. Di.

399

ment in C. P. apply for the rule to the clerk of the errors in that court: pay 4s.; serve copy thereof on his attorney, or on the party himself. *Green v. Upton*, Bar. 410.

This rule expires in eight days. See FORMS subjoined.

The defendant in error on the obtaining this rule, and in order to expedite the making of the transcript, should furnish the clerk of the errors with a copy of the proceedings: the plaintiff in error, on notice from the clerk of the errors, must immediately pay the transcript money: the transcript is thereupon made and examined with the record by the attorney for the defendant in error. In case of non-payment of the transcript money, the writ of error may be non prossed, but no costs are allowed thereon. *Salt v. Richards*, in error, 7 East, 111. And after the rule has run out, the defendant in error may sue out his writ of scire facias quare executionem non, &c. though the transcript was not then actually delivered and filed as it ought to have been. *Branscomb v. Hughes*, 16 East, 646.

Costs in error are given by statute; but they are to be given by the court "afore whom the error is brought;" in case of record not being certified or transcribed to the court, it can have no cognizance; and the court, whose error it is presumed to be, cannot have cognizance; therefore, per Lord Ellenborough, C. J. it was held in the above case, that the statute did not intend costs to be given where non pros is signed, for want of transcribing or certifying the record.

In C. P. execution may not be issued without a certificate in writing, to be signed by the clerk of the errors, of the default in transcribing the record into K. B. R. R. T. and M. 28 Car. II. C. P.

The next step to be taken by the defendant in error to compel the plaintiff in error to proceed, is to obtain a rule to allege diminution. See titles DIMINUTION, Rule to allege diminution. ERROR.

If the proceedings are in C. P., and judgment shall have been signed by default, it will be necessary, if no original be filed, and the vacation of the term in which such judgment shall have been signed shall be elapsed, that the defendant's attorney, before he take out the rule to certify the record, should petition the master of the rolls for an original.

Where necessary
to obtain original.

The case of *Dyke v. Sweeting*, 1 Wils. 181, will shew when this original ought to be made returnable. It was there said by Lee, C. J. that where the want of an original writ is assigned for error, and it appear that all the proceedings are of the same term wherein the original is returnable, such an original warrants those proceedings let it be of any return in the same term; but an original of the term wherein final judgment is given will not warrant it, if by the record it appear that there have been proceedings in the cause in the term or terms before, according to 1 Lev. 69.

If it be probable that a writ of error will be brought, the prothonotary, on alleging such probability, will, unless the defendant's attorney undertake not to bring a writ of error, at the time of taxing the costs allow those of an original writ.

This measure having been adopted, and in case an original shall be judged necessary, the master of the rolls will, on petition, allow the same to be issued, "upon payment of costs to the plaintiff in error, in case he does not further prosecute the writ." See FORM OF PETITION, subjoined.

Make out a precipe, containing county, names, and addition of the parties, &c. which, with the order made by the master of the rolls for the

CERTIFY THE RECORD; PR. DI.; FORMS.

original, carry to the curritor, who will issue the writ; the sheriff returns it nihil; pay 1s. The original is to be sealed, and the return filed with the custos brevium; pay 4d. and the same sum every post term after the return.

Then copy the petition and the order thereon. If the attorney for the plaintiff in error accept the costs under this order, the writ of error is of course at an end; the plaintiff in the original cause is entitled to have the writ of error non-prossed, and also to have execution immediately; pay, on signing nonpros, 5s.; if he do not then accept such costs, he cannot claim any afterwards. See title ERROR, Assignment of Error.

FORMS.

Petition to the
master of the
rolls for an ori-
ginal.

In the Common Pleas.

(Title cause.)

The humble petition of the said ———, the plaintiff.

Humbly sheweth,

That your petitioner having, in ——— term, in the year of our Lord 182—, commenced an action at law against the above named defendant ———, late of ———, in the county of ———, gentleman, in his majesty's court of C. P. at Westminster, in a plea of trespass on the case, to his damage of £——, and your petitioner hath laid his venue in the county of ———.

That judgment was obtained in such action in ——— term last past, for £—— damages, and £—— costs, whereupon the above-named defendant hath brought his writ of error, returnable in his majesty's court of K. B. on ———, wheresoever, &c. but no further proceedings have been had thereon:

That your petitioner hath not as yet sued out any original writ to warrant the said judgment, which he is advised is necessary to be done to warrant the said judgment:

That the time for applying in the ordinary course for the said original writ being expired, the curritor of the said county cannot make out the same without an order from your honour.

Your petitioner, therefore, humbly prays your honour to grant unto him an order that the curritor of the said county of ——— may issue an original writ in this cause out of this honourable court, returnable in his said majesty's court of Common Pleas, on ———.

And your petitioner shall ever pray, &c.

Form of the rule
to certify the re-
cord judgment,
K. B.

In the King's Bench.

——— } Unless the plaintiff in the writ of error certifies the
v. } record within eight days next after notice hereof given
——— } to the said plaintiff or his attorney, a nonsuit will be
entered.

———, clerk of the errors.

The like, C. P.

In the Common Pleas.

——— } Unless the plaintiff in the writ of error brought in this
v. } cause, certifies the record into the court of King's Bench
——— } within eight days next after notice hereof to be given to
him or his attorney, a nonsuit will be entered.

———, clerk of the errors.

CERTIORARI, *In Error*, from C. P. to K. B.

It derives its title from the operative word *certiorari*; to be *certified*. Where issued.

The writ of *certiorari* issues where C. P. upon a writ of error doth not certify all the record, and the plaintiff in error alleges for diminution of the record, or assigns for error the want of an original writ, or of a warrant of attorney, or of some other matter necessary to render the record perfect or complete.

In either case the plaintiff in error prays a writ of *certiorari*, which directs the proper officer to certify such original writ, warrant of attorney, or other matter; which writ ought to be regularly returned.

Where the want of an original is assigned for error, the plaintiff in error must sue a *certiorari*, unless the defendant in error, confess it. *Salk.* 267.

The case was error of a judgment in C. P. after verdict. Want of original assigned for error, but no *certiorari* taken out to get the want of an original certified. *In nullo est erratum* pleaded, and when the cause came on in the paper, it was objected that there ought to have been a *certiorari* and a certificate made of the error; for it might be that there was an ill original, and if that were returned, the plaintiff in error might take advantage of that, and that would not be helped by verdict, though the want of an original were. *Per Holt, C. J.* If the want of an original be assigned for error, and the plaintiff in error does not take out a *certiorari*, and get a return to it, and the want of an original certified, the course is for the defendant to go to the master of the office and get a rule for the plaintiff in error to return his *certiorari*, and if he does not get it done as ordered by the rule, the assignment of error stands for nothing. But if the defendant in error will come in *gratis*, and confess the error, there need be no *certiorari* returned. And as to the matter that there might be a bad original, &c. that is another sort of error; and when the want of an original is assigned for error, the court will never intend that there is a bad original; and judgment was affirmed. *Smith v. Stoneard, 2 Ld. Raym.* 1156. Want of original, &c.

But an original returned by one not sheriff is not assignable for error, *Salk.* 265, and irregularity in the return thereof must be complained of the same term. *Ibid.*

Want of an original was assigned for error, the defendant before the return of the *certiorari* came in *gratis* and pleaded a release in bar, to which plaintiff demurred, and defendant joined in demurrer. *Per cur.* The release is mispleaded for want of a venue: and it was agreed that the court could award *ex officio*, a *certiorari ad informandum conscientiam*, whether there was an original or not. *Holt, contra, Salk.* 268.

So the court can, *ex officio*, award a *certiorari*, to supply a defect in the body of the record, even after *in nullo est erratum* pleaded. *Id.* 270.

If a variant original is returned on the first *certiorari*, the defendant in error may sue a second *certiorari*. *Id.* 266.

Want of original,
&c. &c.

Continuances cannot be returned upon the same *certiorari* with the original. *Salk.* 269.

If upon error, diminution, want of original, warrant of attorney, &c. be alleged, and a *certiorari* is sued out, upon which a record is returned contrary to what is before returned, it cannot be received. *Tysoun v. Hylyard*, 2 *Ld. Raym.* 1122.

If error be assigned in the original, and upon a *certiorari* granted, an erroneous original is returned, and upon this, *in nullo est erratum* is pleaded; and after the court *ad informandum conscientiam* grant another *certiorari* for another original; and upon this a good original is certified, the court ought to intend that this is the original upon which the judgment was given in favour of judgments, which ought to be intended to be good. *Cro. Car.* 91. *Style*, 176. 2 *Rol. Rep.* 362. *Godb.* 407. *Rol. Abr.* 765.

An original writ of the term wherein final judgment is given will not warrant that judgment, if it appear upon the same record, that there have been proceedings of a preceding term. But the plaintiff below ought to have an original writ of the term the *placita* is of. *Dyke v. Sweeting*, 1 *Wils.* 181.

If a *certiorari* be prayed to certify an original or a warrant of attorney of a wrong term, and the chief justice, or the *custos brevium*, return that there is no original or warrant of that term, the defendant in error may make a suggestion of the right term, and pray a *certiorari*, which, when returned and filed, he may join in *nullo est erratum*, and enter it on the roll, paying the plaintiff's attorney 2s. 4d. for it.

Want of original was assigned, *certiorari* prayed, and return no original; afterwards the defendant applied to Chancery, and upon affidavit that instructions were given to the cursitor for an original, but they were lost, the court of Chancery allowed that the original should be supplied; upon which the defendant in error prayed another *certiorari*, and an original was certified of the same term in which the default of an original was certified before; on which it was moved that this was irregular, for before the second *certiorari* was returned, the defendant ought to have given a copy of the original to the plaintiff's attorney, but the master informing the court that the course was so when the second original certified was of another term, but not when it was of the same term, the motion was disallowed. *Comm.* 118.

The plaintiff assigned for error want of an original, and the defendant thereupon did not give a rule; but at his own proper charges took out a *certiorari*, and procured a certificate of an original *sed per cur.* This is ill, for the error is not completely assigned until the certificate is returned, by which it appears that there was no original in the cause. *Id.* 115.

If on a *certiorari* upon a writ of error it be certified that the judgment was *quod defend. sit in misericordia*, the defendant in error cannot allege diminution, to wit, that the record is *quod capiatur*, because that is contrary to the record certified. *Rol. Abr.* 764.

Want of warrant
of attorney.

In a writ of error in B. R. on a judgment in C. B. the want of warrant being assigned for error, the plaintiff prayed one *cer-*

tiarari to the C. J. and another to the *custos brevium*, both of whom returned *non inveni aliquod warrant*, and the defendant dying, the plaintiff by *journeys accounts*, brought a new writ of error against the son and heir of defendant; who, appearing, alleged diminution in that the warrant of attorney was not certified, and prayed another *certiorari* to the *custos brevium*, and it was urged that the return was not *quod non habetur*, &c. but *quod non inveni*, &c. so that if upon the second a warrant should be returned, it would not be repugnant: but it seemed to Wray, C. J. that it would be hard to grant a new *certiorari* in this case; for though if any variance could be alleged, it would be otherwise; as was adjudged in the case of one Lassels, where it was certified there was no warrant, and because the original was *inter Lassel's execut. testamenti*, &c. where he was not named executor in the first *certiorari*, and upon the matter a new *certiorari* was granted. *Leon. 22. Vide Cro. Jac. 277, and Bulstr. 21.*

Where to the first it was returned there was no warrant of attorney in that term wherein the action was commenced, a second *certiorari* was awarded*.

Error of a judgment from C. P. on a judgment by default, the error assigned was, that there was no warrant of attorney for the defendant, the now plaintiff, entered on the record below. It was objected that a man shall not take advantage of his own neglect in not making proper entries; to which it was answered, that in judgment by default the plaintiff is to make up the whole record, and therefore it is his own laches. But the court ordered the cause to stand over till the court of C. P. could be moved to amend the record, and afterwards the chief justice of C. P. directed a proper warrant of attorney to be filed and entered, and thereupon a new *certiorari* issued, and the judgment was affirmed. *French v. Corneleys, 1 Bl. R. 453.*

Error upon a fine in C. P. and error assigned in the proclamation, upon which a *certiorari* went to the *custos brevium*, who certified that two of the proclamations were made in one day; but, it appearing in the chirographer's office that the proclamations were duly made, and he being the principal officer as to them, and the *custos brevium* having only an abstract thereof, upon the prayer of the defendant a new *certiorari* was directed to the chirographer, who having certified the proclamations duly made, after examination of the clerks of C. P. by the justices of K. B. they awarded that the proclamations with the *custos brevium* should be amended

Want of warrant of attorney, &c.

Two proclamations on same day; error.

* When all the proceedings are in one and the same term, an original of that term will warrant the same, but not otherwise. *Booth v. Beard, 1 Keb. 327.* But an original of the term final judgment is given, will not warrant that judgment, if it appear upon the same record that there have been proceedings of a precedent term. *Dyke v. Sweeting, 1 Wils. 181.*

The case of originals differs from warrants of attorney; for it is sufficient if a warrant of attorney be filed at any

time pending the suit, let it be which term it will. *Stat. H. VIII.* only requires a warrant of attorney to be filed in the cause, and *stat. 4 Ann.* requires it to be filed according to the course of the court, and that is, to have it filed any time pending the suit; but it is otherwise as to an original writ; for if there be proceedings in the action in a term preceding the return thereof, the original of a term after will not support them.

according to those in the custody of the chirographer. 3 *Lev.* 106.

Want of writ of privilege.

Attorney and his wife sued by writ of privilege, and had judgment by default, on which error was brought in B. R. and want of a writ of privilege assigned for error. A *certiorari* was taken out to make good the error, but was not returned, and the court was of opinion that if this suit was by writ of privilege, it was ill; but they held that it does not sufficiently appear to them that it was by writ of privilege; for the recital in the declaration is not sufficient for them to found a judgment, but the writ of privilege ought to have been brought before the court by return to the *certiorari*, and therefore judgment was affirmed. *Drew et ux. v. Rose, Ld. Raym.* 1398.

No original bill.

Error of a judgment in C. P. after verdict in a suit against an attorney, general errors were assigned, and the plaintiff in error insisted that all actions in C. P. must be either by original writ, original bill, or attachment of privilege. But this action does not appear to have been by any of these ways; for these reasons the proceedings were irregular, and therefore he prayed judgment, *sed per cur.*; this being before us by writ of error, we cannot take notice whether there was any original bill or not, the defendant being sued as attorney, it not being assigned for error that there was no original bill. But in order to have taken advantage of this, the plaintiff in error should have assigned for error that there was no bill, and took out a *certiorari*, and got it returned that there was none: Judgment affirmed. *Groddell and Others v. Tyson, Ld. Raym.* 1441.

Wrong teste of *certiorari*.

In error, the *teste* of a writ of *certiorari* was by mistake made in the 13th year of our Lord instead of our reign; on motion for leave to amend, it was doubted whether the court had power to amend such a writ or not. In support of the amendment, the statutes 8 *H. VI. c. 8.* and 14 *E. III. c. 6.* and *Brooke and Others v. Cooper, Trin. 6 G. II.* to shew that the *teste* of a writ of inquiry out of term was amended, and an Anonymous case in 3 *Vent.* 171. and *Blackmoor's case, 8 Rep.* were cited. For defendant it was insisted that this was such a writ as could not be amended, and 1 *Lev. 2.* was cited to shew that no original writ can be amended, and that the *teste* of a writ of error is not amendable, was cited, 5 *G. I. c. 13.* In reply it was said, that this was not an original, but a judicial writ, therefore amendable by all the statutes. But while the court took time to consider, the amendment, by consent of the parties, was ordered on payment of costs. *Masters v. Ruck, Bar.* 12.

Want of writ of inquiry, &c.

On error upon a judgment in *assumpsit* by *nil dicit*, in C. B. and writ of inquiry executed and final judgment, plaintiff in error assigned the general errors, and also that there was no writ of inquiry or inquisition taken, filed, and remaining upon record in C. P. and prayed a *certiorari*, directed to the *custos brevium* of C. P. of such a term as filed, and prayed a *certiorari*; to which the *custos brevium* returned, that upon search he found the writ of inquiry, &c. and then defendant set out the writ of inquiry, &c. which warranted and agreed with the record, and thereupon pleaded *in nullo est erratum*; and for the plaintiff it was insisted that

judgment ought to be reversed, because the *custos brevium* could not return a fact upon the second *certiorari*, in every particular contrary to his return upon the first, and the court cannot tell to which return to give credit, *sed non allocatur*. For there being a will take return of a writ of inquiry, which warrants the record, we positive that to be true; and judgment was affirmed. *Shipman v. Lethieullier*, *Ld. Raym.* 1476.

The plaintiff in error took out a *certiorari* of a wrong term, which did not verify his error, and now he moved for the second *certiorari*, which was denied, the court saying it may be granted to affirm, but not to reverse a judgment. *Merryfield v. Berry*, *Str.* 765. Where second *certiorari* denied.

Plaintiff brought a writ of error upon a judgment against him in C. P. by *nil dicit*, and assigned, in Trinity Term, the want of an original, and the want of a warrant of attorney, and one *certiorari* was directed to the chief justice as to the warrant of attorney, and another *certiorari* to the *custos brevium*, as to the original, which bore *teste* on the 21st June, (which was before the errors were assigned) upon which the *custos brevium* returned that there was no original, &c. The defendant pleaded *in nullo est erratum*; and judgment was affirmed *nisi*, because the plaintiff in error ought to take out a *certiorari* to verify his error that there was no original; but this *certiorari* bearing *teste* before the assignment of the errors, could not be a *certiorari* upon that assignment of errors. *Bowers v. Mann*, *Ld. Raym.* 1554. *Str.* 819.

Thus far the authorities on this title collected by Mr. Crompton. It should be seen that a right return be made to the *certiorari*, for although it appear on the return that no bill was filed in K. B. against the defendant (in a suit there by bill) in the term of which the declaration is entitled, but that a bill was filed against him by the plaintiff in the following vacation it is not erroneous, if it also appear that the bill was filed of the preceding term. *Parrot one, &c. v. Spraggon*. In the Exchequer Chamber in error, 2 *H. Bl.* 608. Caution as to return to *certiorari*.

The court *ex officio* may, at any time pending a writ of error, award a *certiorari* for the purpose of supplying a defect in the body of, as well as in what may be collateral to, the record; of course, therefore, notwithstanding any act of the parties, the court, for their own information, may award this writ in order to affirm, but not to reverse a judgment. 2 *Bac. Abr.* 206, may indeed be cited to shew that formerly the court *ex officio* awarded a *certiorari* to reverse a judgment.

See titles DIMINUTION. ERROR.

PRACTICAL DIRECTIONS.

ERROR FROM K. B. TO EXCHEQUER CHAMBER.

It will have sufficiently appeared in what cases the certiorari in error may be issued.

It is engrossed on parchment, and with a precept for the same carried to Mr. Smith's office; pay signing 8s. sealing 7d. If an original writ be to be certified, the precept and certiorari will be FORMS

CERTIORARI; *In error*; PR. DI.; FORMS,

Nos. 1 and 2. And if the warrant of attorney be to be certified, FORMS Nos. 4. and 5.

PRACTICAL DIRECTIONS.

ERROR. C. P. TO K. B.

The plaintiff in error being ruled by the defendant in error to return the writ of certiorari, proceeds to make the same out; and having done so, carry same to Messrs. Prevost and Chambre; pay signing 1s. 8d.; sealing 7d.; then carry same to the custos brevium, C. P. for his return; which being obtained, it is to be filed with the clerk of the Treasury Chamber, K. B. at Westminster. The defendant's attorney (in error) is of course to search for the return there, and if returned he bespeaks a copy.

FORMS.

No. 1. ———, to wit. Writ of certiorari to certify an original writ (or warrant of attorney for ———) between ——— plaintiff, and ———, late of ———, defendant, returnable without delay (or immediately).

(The attorney's name and date.)

No. 2. George, (&c.) To our trusty and well-beloved ——— keeper of the writs, rolls, and records of our court of the Bench, greeting: We being willing to be certified whether any original writ between ——— and ——— late of ——— in a plea of ——— (or as the plea is) be filed in your custody, of ——— term, in the ——— year of our reign, or not, do command you, that having searched our original writs directed to the sheriff of ——— and ———, which are filed of record in your custody of the aforesaid ——— term, in the ——— year of our reign, what you shall find of an original writ, between the parties aforesaid, of the plea aforesaid, you certify to us, without delay, wheresoever we shall be in England, together with the return and indorsement thereof, as fully and entirely as the same remain in your custody, and this writ. Witness, Sir Charles Abbott, knight, at Westminster, &c.

No. 3. The answer of ———, keeper of the writs, rolls, and records, Return that there is an original. within-named.

By virtue of this writ to ———, (me or us) directed ———, (I or we) do hereby certify to our lord the king, that having searched the original writs directed to the sheriff of ———, which are filed of record in ——— (my or our) custody, of ——— term, in the ——— year of the reign of our said lord the king, (I or we) find an original writ between the parties within-named in a plea of ———, (as the plea may be) directed to the sheriff of ———, filed of record in ——— (my or our) custody of the term aforesaid, the tenor of which said original writ, together with the nature and the indorsement thereof, as fully and entirely as the same remain in (my or our) custody, (I or we) do hereby certify to our lord the king, as appears by the schedule hereto annexed, and as (I am or we are) within commanded.

A copy of the original writ is then to be subjoined, as also the sheriff's return thereto, indorsed on the same following the return.

No. 4. ———, to wit. Writ of certiorari to certify warrant of attorney for ———, plaintiff, against ———, late of ———, defendant, returnable without delay.

(Attorney's name and date.)

George, (&c.) To our trusty and well-beloved ———, our chief justice of the Bench, greeting: We being willing to be certified whether ——— (*the plaintiff*) made ——— gentleman, his attorney of record against ——— (*the defendant*) late of ——— on a plea of ——— (*as the plea is*) before you and your companions, our justices of the Bench aforesaid, of the term of ——— in the ——— year of our reign or not, do command you, that having searched the rolls and other memorandums of the warrants of attorney of the term aforesaid, being in your custody of record, what of the said warrant of attorney between the parties aforesaid, of the plea aforesaid, you shall find in your custody, you certify to us without delay wheresoever we shall be in England, together with his writ. Witness, Sir Charles Abbott, knight, &c.

No. 5.
Certiorari
thereon.

The answer of ———, the chief justice within-named.

Having searched the rolls, and other memorandums, of the warrant of attorney of the term and year between the parties within written, being likewise in my custody on record, I there find no warrant of attorney filed of record; and this I certify to our lord the king as I am commanded.

No. 6.
The return no
warrant of attor-
ney.

(Signature.)

CERTIORARI; *Certiorari to remove a Cause.*

The removal of proceedings from an inferior court by this writ, is certainly not frequent, but although many writers upon practice have omitted mention of it, there seems no good reason for its disuse, but on the contrary it is in some cases the proper proceeding, I shall therefore attempt to supply such information as may assist the practitioner.

Not frequent.

This writ of *certiorari* is an original writ, and issueth sometimes out of the Chancery, and sometimes out of K. B. and lieth where the king would be certified of any record which is in the Treasury, or in C. P. or in any other court of record which is in the Treasury, or before the sheriff and coroners, or of a record before commissioners, or before the escheator; then the king may send that writ to any of the said courts or offices to certify such record before him *in banco*, or in the Chancery, or before other justices where the king pleaseth to have the same certified: And he or they to whom or who the *certiorari* is directed, ought to send the same record, according to the tenor of the writ, and as the writ doth command him, and if he or they fail so to do, then an *alias* shall be awarded, and afterwards a *pluries vel causam nobis significes*, and after an attachment, if a good cause be not returned upon the *pluries*, wherefore they do not send the record. *F. N. B.* [245] A.

What; and
whence it issues.

A *certiorari* and a *habeas corpus* differ; for a *habeas corpus* removes the body *cum causa*, and the declaration is filed in the superior court; but on a *certiorari* proceedings must be had on the record as it stands when removed. *Woodcraft v. Kinaston*, 2 *Atk.* 317.

In what cert. and
ha. cor. differ.

But where a *certiorari* was issued out of K. B. to remove the record of the foot of a fine, C. B. it was not allowed; but a *certiorari* out of Chancery for the tenor was, and then it was sent into B. R. by *mittimus*. *Dyer*, 271 cited, *ubi supra*, *F. N. B.* n.

Where cert.
not allowed.

It lies to remove an ejectment from an inferior court. *Doe, d. Sadler v. Dring*, 1 B. & C. 253.

Where it is,

And the court, out of which the *certiorari* may be issued, must have jurisdiction if the inferior court have; and if the inferior court have not jurisdiction, or do not proceed according to law, although the cause cannot be determined there, K. B. may, before judgment, issue a *certiorari*. *Lil. P. R.* 253. and in case of the inferior court proceeding in a course different from that of the common law, a *certiorari* will lie *after* judgment. *Greenvelt v. Burwell*, 1 *Salk.* 263.

By the custom of London it is actionable in the court there to call a woman whore, 2 *Rol. Abr.* 69. *Carth.* 75. and certain customs or bye-laws can be only suable in the inferior court, so no *certiorari* will lie to remove the cause therefrom. 1 *B. & P.* 93. nor where the debt or damages appear to be under 40s. *Clift*, 374. but where it appeared that the defendants, being excise officers, could not have had an impartial trial in the inferior court, K. B. refused to grant a *certiorari*, on the ground of the damages being laid under 40s. *Daniel v. Phillips*, 4 *T. R.* 499.

Where justice between the parties cannot be otherwise rendered, a *certiorari* may issue out of K. B. where, for instance, the inferior court refuses to award execution. 1 *Lil. P. R.* 252: And for the furtherance of justice, and to reach the persons or effects of those described in the preamble to the subsequent enactment, that is to say, those persons served with process issuing out of inferior courts, where the debt is under £10, and who may in order to avoid execution, remove their persons and effects beyond the limits of the jurisdiction of such courts; it was by stat. 19 G. III. c. 70. s. 4. enacted, "that in all cases where final judgment shall be obtained in any action or suit in any inferior court of record, it shall and may be lawful to and for any of his majesty's courts of record at Westminster, upon affidavit made and filed of such judgment being obtained, and of diligent search and inquiry having been made after the person of the defendant, or his effects, and of execution having issued against such person or effects, and that they are not to be found in jurisdiction of the inferior court, which affidavit may be made before a judge or commissioner in such superior court, to cause the record of the said judgment to be removed into such superior court, and to issue writs of execution thereupon to the sheriff of any county or place against the defendant, person, or effects, in the same manner as upon judgment obtained in the said courts at Westminster; and the sheriff is enabled to levy 20s. for the extraordinary costs of the plaintiff in the inferior court subsequent to the judgment, and of the execution, in the superior court, over and above the money for which the execution shall be levied."

Statute 19 G. 3.
c. 70. s. 4.

Extended to
Wales, &c.

Equitable con-
struction of the
statute.

By stat. 33 G. III. c. 68. s. 1, this provision is extended to Wales and the counties palatine; but from thence only a transcript of the record is to be removed. This statute is equitably construed. In *Jordan v. Cole*, 1 *H. Bl.* 532, although a prisoner in actual custody is not expressly mentioned in the act, yet it was ruled, that where judgment is signed against a defendant in an inferior court of record, and he surrenders in discharge of his bail, and before he is charged in execution is removed to the Fleet by *habeas corpus*, the court will grant a *certiorari* to remove the record, in order to charge him in execution in the Fleet, by virtue of statute 19 G. III.

Besides the authority vested by this statute in any of the superior courts of record, it is held, that the king hath the superintendence of all inferior courts, and that therefore their proceedings are removeable into the court of K. B. Superintendency of all inferior courts, where vested.

On one of the numerous points in dispute between the College of Physicians and Dr. Groenvelt, cited under the name of Groenvelt v. Burwell, 1 Salk. 144, Holt, Ld. Ch. J. ruled that certiorari lay on a judgment given by the censors of the College of Physicians formal-practice, and the L. C. J. observed, that where the commissioners of sewers, in consequence of stat. 13 Eliz. which enacts that the commissioners shall not be compelled to make any certificate, "thought themselves not accountable on a certiorari, and refused to obey a certiorari issued out of K. B., the whole body of the commissioners were laid by the heels." Case.

But the writ of certiorari cannot be had as a matter of course: Williams v. Thomas, E. 22 G. III. cited Doug. 751. (v), or unless some special ground be laid. *Id.* Cannot be had of course.

And on the removal of a cause from an inferior court by a writ of certiorari, the plaintiff needs not in C. P. file his declaration until the end of the term after that in which the writ is returnable. Watson v. Eagle, 4 J. B. Moore, 190.

PRACTICAL DIRECTIONS.

Where the writ issues out of Chancery, it is to be deemed an original writ, and a precipe must be made for the cursitor; who, thereupon, makes it out; pay 30s. 6d.; it may be tested in term or vacation, and is returnable on a general return day.

The same is left with the proper officer, judge or judges, of the inferior jurisdiction, declaring to whom the writ is directed.

Call for the allowance, and return thereto, which should be made as soon as possible; the further proceedings as to putting in bail, &c. will be nearly the same as where a cause is removed by habeas corpus cum causa, and will therefore be treated under that head. But as to when plaintiff may declare, see 4 J. B. Moore, 190, cited above. Where certiorari is misdirected, third persons cannot object thereto. Daniel v. Phillips, 4 T. R. 409.

See title HABEAS CORPUS CUM CAUSA.

FORMS.

George, (&c.) To ——— (for the direction, see title DIRECTION OF WRITS) greeting: Being willing to be certified on a certain plaint, levied in our court before you against ———, at the suit of ———, in a plea of ——— (as the plea may be) we command you, that the plaint aforesaid, as fully and entirely, with all things touching it, as it remains before you; by whatever names the parties may be called in the same, you certify and send to us at Westminster, together with this writ, on ——— next after ——— that we may further cause to be done therein what of right we shall see fit to be done. Witness, Sir Charles Abbott, knight, at Westminster, &c. No. 1.
Certiorari to remove a cause.

George, &c. To ——— (vide observation, No. 1.): Being willing to be certified of the proceedings in a certain cause lately depending in our court before you between ——— and ———, of a plea of ——— (as the plea is) and of the judgment thereupon obtained in our said court of ———, We command you that you No. 2.
Certiorari on removal from an inferior jurisdiction, statute 33 G. 3. c. 68.

CERTIORARI; FORMS. CESSET EXECUTIO.

send to us plainly and distinctly the transcript of the proceedings in the said cause, and of the record of the said judgment therein, with all things relating thereto, which are in your custody, as it is said, by whatever names the said parties may be called therein, together with this writ, so that we may have them on ———— wheresoever we shall then be in England, that we may further cause to be done thereupon what of right and according to the form of the statute in such case made and provided, we shall think fit to be done. Witness, Sir Charles Abbott, knight, &c.

No. 3.
Certiorari to
court of pleas,
Lancaster to
K. B. record
removed.

George, (&c.) To our Chancellor of our county palatine of Lancaster, or to his deputy there, greeting: We being willing to be certified on a certain plaint in our court of Common Bench for our said county palatine, against ———— at the suit of ———— on a plea of ———— command you that by our writ, under the seal of our said county palatine, duly made and directed to our prothonotary of our said court of Common Bench for our said county palatine of Lancaster, you command the same prothonotary that the plaint aforesaid, as fully and entirely, with all matters pertaining thereto, as it remains before him, by whatever names the said ———— and ———— may be called in the same, without delay, be certified to you, in order that you may certify the same, together with this writ, to us at Westminster, on ———— next after ———— that we may further cause to be done therein what of right we shall think ought to be done. Witness, Sir Charles Abbott, knight, &c.

No. 4.
A certiorari, C. P.
to the mayor, &c.
of Bristol.

George, (&c.) To the mayor, aldermen, and sheriffs of the city of Bristol, and to the mayor and constables of the staple of the same city, and also to the bailiffs of the mayor and commonalty of the same city of Bristol, of their court of Tolsey, and to the bailiffs of the said mayor and commonalty of the same city of their court of Piepowder, and every of them, greeting: We being willing that our justices of our court of the Bench should be certified, as well of all plaints levied or affirmed in our court before you, or any of you, against ———— at the suit of ———— as of all attachments upon those plaints, or any of them, made in the hands of ———— command you, and every of you, that all and singular the said plaints and attachments, together with all things touching the same, you distinctly and plainly send to our said justices of our said court of the Bench at Westminster, on ———— (*a general return*) as fully and as amply as the same are remaining before you, or any of you, by whatsoever names the said parties be called therein, together with this writ, in order that our said justices may cause to be further done thereupon what they shall think meet further to be done. Witness, Sir Charles Abbott, knight, &c.

CESSET EXECUTIO. *That execution shall be stayed or stay.*

What.

This phrase is applicable where there is a condition for a *stay of execution*, as where there are defendants who sever in pleading, the jury, who try the first issue shall assess damages against all with a *cesset executio*, and the other defendants, if found guilty, shall be contributory to those damages.

See title SCIRE FACIAS.

CESSET PROCESSUS.

What.

This phrase is applicable where there should be a *stay of the process or proceedings*. Insolvency of the defendant, after the

action brought, is a good cause against judgment in the case of a nonsuit. *Bailey v. Wilkinson*, 2 *Doug.* 671. but unless the plaintiff will consent to stay all further proceedings, and to enter a *cesset processus*, the court will bind him down to a peremptory undertaking.

CESTUI QUE TRUST. See titles EXECUTION. FIERI FACIAS. NOTICE OF SET OFF.

CHALLENGE, *Challenge of Jury.*

No person should sit as juror against whom may exist any proper objection. Since stat. 3 G. II. c. 25, in consequence of which a very sufficient number of jurymen are in general in attendance, to prevent trouble, and indeed to save the time of the court, which might be too much occupied with the discussion of the grounds of challenge, the clerk of *nisi prius* will strike out of the pannel any name or juror merely mentioned as objectionable by either party, without any ground of challenge being assigned. Observation.

Yet the grounds of challenge may shortly be enumerated.

Challenge to the array is an exception to the whole pannel at once. In the pannel the jury are arrayed or set in order by the sheriff in his return; and challenge may be made upon account of partiality, or of some default in the sheriff or his under officers who arrayed the pannel; and generally, whenever the *venire* would properly have been directed to the coroner or elisors, a challenge to the array returned by the sheriff would be proper and sufficient for quashing it. So when made by a person or officer of whose partiality there is any ground of suspicion; also, though there be no personal objection against the sheriff; yet if he array the pannel at the nomination, or under the direction of either party, this is good cause of challenge to the array. Challenge to the array.

Challenges to the polls, *in capita*, are exceptions to particular jurors; and in 1 *Inst.* 156. they are reduced to four heads, viz. 1. *Propter honoris respectum.* 2. *Propter defectum.* 3. *Propter affectum.* 4. *Propter delictum.* To the polls.

The author illustrates these exceptions, 1st. *propter honoris respectum.* Where a lord of parliament is impannelled on a jury; such lord may be challenged by either party; or he may challenge himself. *Propter honoris respectum.*

2. *Propter defectum.* Where the jurymen, (or more properly the person named in the pannel) being an alien born, or a slave or a bondsman; or be not resident in the county; or have not the necessary qualification of an estate; all these are grounds of challenge; but as to the last-mentioned objection where the jury is *de medietate lingue*, that is one moiety of the English tongue or nation, and the other of any foreign one, no want of lands shall be a cause of challenge to the alien, statute 2 H. V. stat. 2. c. 3. 8 H. VI. c. 29. or being an infant, idiot, or *non-sane*. *Propter defectum.*

3. *Propter affectum.* Where there may be ground to suspect bias or partiality; as that the person challenged is of kin to either party within the ninth degree. *Finch L.* 401. that he has been arbitrator on either side; that he has an interest in the cause. Lord Mansfield, C. J. in *Hesketh v. Braddock*, 3 *Barr.* *Propter affectum.*

CHALLENGE, *Of a Jury.*

1856. That an action is depending between him and the party; that he has taken money for his verdict, or even eat and drank at the expence of either party after he is returned; that he has formerly been a juror in the same cause; that he is the party's master, servant, tenant, counsellor, steward, or attorney; or of the same society or corporation with him; all these are principal causes of challenge, which, if true, cannot be over-ruled, for jurors must be *omni exceptione majores*. Challenges to the favour are also where the party hath no principal challenge, but objects only some probable circumstances of suspicion, as acquaintance and the like, the validity of which must be left to the determination of triors, whose office it is to decide whether the juror be favourable or unfavourable. The triors, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn, and then he and the two triors shall try the next, and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest. *Co. Lit.* 158.

In *Dolby's* case triors were named. The jury had been returned by Garratt, one of the sheriffs, who had contributed to the fund out of which the defendant was prosecuted. The right to challenge on this account was much resisted, principally on the ground of his having withdrawn his name from the society who had taken upon themselves the prosecution of the defendant, but as Garratt had not withdrawn the money originally contributed by him the challenge was held good. The case will doubtless be reported.

Propter delictum.

4. *Propter delictum*; where the person challenged has been convicted of treason, felony, perjury, or conspiracy, or where for some infamous offence he hath received judgment of the pillory, tumbrel, or the like; or hath been branded, whipped, or stigmatised, or where he hath been outlawed or excommunicated, or hath been attainted of false verdict, *premunire*, or forgery; and lastly, but now necessarily an obsolete ground of objection, the having proved recreant, when champion in the trial by battel, and having thereby lost his *liberam legem*.

To what a juror may be examined or not.

As to such causes of challenge as are not to his dishonour or discredit, a juror may be examined on the oath of *voir dire veritatem dicere*, but not with regard to any crime, or any thing which tends to his disgrace or disadvantage. *Co. Lit.* 158 *b*.

The whole of the above will be recognized as being adopted with some little addition or variation from the summary of the older authorities, 3 *Comm.* 358, and some omissions are supplied from *Rol. Abr. Hob.* 294. *Gilb. C. P.* 95.

What a ground for bill of exceptions.

The judges over-ruling a challenge is a ground for a bill of exception.

And see where in a criminal case one of the jury became incapable of discharging his duty, the court of oyer and terminer charged a fresh jury, who convicted the prisoner. But *semble*, that the prisoner should be again allowed to challenge each of the eleven former jurymen. *The King v. Edwards*, 4 *Taunt.* 309.

No challenge can be taken either to the array or to the polls until a full jury have appeared; and therefore, where the challengea

are taken previously, they are irregularly made. *Rex v. Edmonds and Others*, 4 B. & A. 471.

The disallowing of a challenge is not a ground for a new trial, but for a *venire de novo*; and every challenge must be propounded in such a way as that it may be put at the time upon the *Nisi Prius* record, so that the adverse party may either demur, or counterplead, or deny the matter of challenge, in which last case only, triers are to be appointed; and therefore where the challenges were not put on the record, the defendants were held not to be in a condition to ask the opinion of this court, as a matter of right, upon their sufficiency. *Id. ib.*

The sheriff's officer had neglected to summon one of the twenty-four special jurymen returned on the pannel: Held, that this was no ground of challenge to the array for undifferency on the part of the sheriff. *Id. ib.*

Held also, that it is not competent to ask the jurymen (whether special jurymen or talesmen) if they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but that such expressions must be proved by extrinsic evidence. *Id. ib.*

See titles JURY, RIGHT, WRIT OF RIGHT, TALES.

CHANGING THE ATTORNEY. For cases on this head see title ATTORNEY, sect. II. *Abstract of Rules and Orders*; also sect. XII. Cases as to Attorney generally; his Liability, Privilege, &c.

PRACTICAL DIRECTIONS.

The attorney may be changed either by motion in court, and rule is to be drawn up for that purpose; or by summons and order thereon. See, if necessary, titles MOTION. SUMMONS.

The practice is to serve a copy of the rule or order on the opposite attorney, either separately or with the next proceedings, of which it may have been necessary to give him notice in the cause.

CHESTER. See titles COUNTIES PALATINE. DIRECTION OF WRITS.

CHIROGRAPHER, from the Greek, signifying "a writing with a man's hand;" an officer of the court of C. P. who ingrosses the fines, and deliver the indentures of them to the parties, &c. See title FINE. *Table of Officers and Offices*, prefixed.

CHRISTIAN NAME. See titles ABATEMENT. MISNOMER.

CHURCHWARDEN. A churchwarden is within the protection of stat. 24 G. II. c. 44.; and cannot be sued in trespass for any act done in obedience to the warrant of a magistrate, without his name being joined in the action. *B. N. P.* 24. *Harper v. Catr*, 7 T. R. 270. See title CONSTABLE AND HEADBOROUGH.

CINQUE PORTS. See title DIRECTION OF WRITS.

These are, 1. **HASTINGS**; to which belong Seaford, Pevensey, Hedney, Winchelsea, Rye, Hamine, Wakesbourne, Creneth, and Forthcliffe. Their names.

2. **ROMNEY**; to which belong Bromhall, Lyde, Oswarston, Dangemare, and Romenhall.

CINQUE PORTS. CIRCUITY OF ACTION.

3. HYTHE; to which belongs Westmeath.
4. DOVER; to which belong Folkstone, Feversham, and Marge.
5. SANDWICH; to which belong Fordwich, Reculver, Serre, and Deal.

Writs of *capias*, *latitat*, *habeas corpus*, *certiorari*, *quo minus*, &c. may issue, properly directed, into this jurisdiction. They cannot, however, award process of outlawry, *Cro. Eliz.* 910; but on a judgment given in the Cinque Ports, no writ of error lies in K. B. or C. P. 4 *Inst.* 224.

That the cause of action arose in a Cinque Port is a good plea to the jurisdiction of the court.

CIRCUITS.

What they are.

Certain divisions of the kingdom appointed for the judges to visit in the vacations preceding Easter and Michaelmas terms in every year, for the trial of causes, or for the administering of justice. See 3 *Comm.* 58.

These divisions are six, and are known by the names following: viz.

1. MIDLAND. 2. NORFOLK. 3. HOME. 4. OXFORD.
5. WESTERN. 6. NORTHERN.

To each of these six divisions several neighbouring or surrounding counties are attached, and the causes are tried in each county, according as the respective venues are laid.

The MIDLAND circuit contains Northampton, Rutland, Lincoln, Nottingham, Derby, Leicester, Warwick.

The NORFOLK contains Bucks, Bedford, Huntingdon, Cambridge, Norfolk, Suffolk.

The HOME contains Hertford, Essex, Kent, Sussex, Surrey.

The OXFORD contains Berks, Oxford, Hereford, Salop, Gloucester, Monmouth, Stafford, Worcester.

The WESTERN contains Southampton, Wilts, Dorset, Cornwall, Devon, and Somerset.

The NORTHERN contains York, Durham, Northumberland, Cumberland, Westmorland, Lancashire.

It is only since the present accession that the lent circuit has been extended to the four northernmost counties.

The officers belonging to the different circuits are, the clerk of the assize, the associate, the clerk of the arraigns, the clerk of indictments, the judge's marshal, the crier, the clerk, the steward and tipstaff.

No clerk of assize shall act as counsel on the circuit, on pain of £10. 33 *H. VIII.* c. 24.

The sheriff of each county and his deputy are to attend the judges; the coroners also attend to deliver in all inquisitions to the clerk of the assize in court, and return all writs of *venire*, *distringas*, and *habeas corpora*, where the sheriff is a party in the suit.

See *Table of Offices and Officers*, prefixed.

CIRCUITY OF ACTION.

Where applicable.

This term is applicable where matter must be pleaded in *bar* to an action, instead of making it a ground of another or second action, it being observed by Buller, J. in *Smith v. Mapleback*, 17. R. 441, that "it is a maxim of law so to judge of contracts as

to prevent a multiplicity of actions. As supposing the obligee of a bond covenanted that he would not sue on it, the courts say that shall operate as a release; for if it operated only as a covenant, it would produce two actions."

CLERGYMAN.

A clergyman is not only, as mentioned under the head ARREST, page 84, privileged from arrest *while* performing divine service, but also in going to and returning from church; but not if he stay in the church with a fraudulent design of eluding the process of the law; and it is said, that the party grieved may have an action upon the several statutes by which this privilege is created. 12 Co. 100. It is also said, that such arrest under such circumstances is false imprisonment, 5 Bac. Abr. 565. To this observation Mr. Tidd, vol. i. page 241, subjoins, that from several later decisions it may be collected that, if any action would lie which is doubtful, it should be an action on the case, and not an action of trespass against the sheriff or his officers, and cites 3 Wils. 341. 2 Bl. R. 1087. 1190. Doug. 671.

See titles LEVARI FACIAS. SEQUESTRATION.

CLERK OF THE DECLARATIONS.

This officer is mentioned here more particularly for the sake of adding that he is entitled to 2s. per term from every attorney.

R. M. 15 C. II. reg. 3. R. E. 19 C. II. and to this last rule is added a clause which gives the chief clerk or secondary of the court a discretionary power to suspend the attorney, not paying the above sum upon reasonable request.

See *Table of Officers and Offices*, prefixed.

COGNIZANCE. See titles CONUSANCE. REPLEVIN.

COGNOVIT ACTIONEM. *He hath confessed the Cause of Action.*

The term by which a defendant's confession or acknowledgment of the cause of action is known. What.

It may be made at any intermediate stage of the suit, even before declaration. Webb and Another v. Aspinall, 7 Taunt. 701. When made, &c.
1 Chit. R. 268. n.

Although it seems leave was given to file a bill against an attorney *nunc pro tunc*, where judgment was signed, without having filed a bill on which he had given a *cognovit*. 1 Chit. R. 268.

The stage at which such confession may be made somewhat varies the form of the *cognovit*. Thus, after declaration and before plea, it is a mere confession of the action; after plea pleaded, or demurrer filed, it usually contains a waiver of, or an agreement to withdraw the plea or demurrer. If made after plea, it is called a *cognovit actionem relicta verificatione*, [that is, on the plea being withdrawn, he hath confessed the cause of action] and in that case in K. B. the defendant's attorney ought to go before the master and withdraw it. 1 Ld. Raym. 945. In C. P. no personal appearance of the defendant's attorney is necessary. See PRACTICAL DIRECTIONS subjoined.

A *cognovit* is a waiver of the objection of common bail not having been filed by the plaintiff in time. 1 Chit. R. 268, (a).

Effect of bankruptcy on it.

Adherence to its terms.

Where bail discharged or not.

Effect of agreement on *cognovit*.

Where attorney must be present or not.

It is a convenient instrument for both parties, since it saves trouble, time, and expence to the plaintiff, and on these considerations he is very often influenced to indulge the defendant with a reasonable time for payment of the debt, with the costs incurred; the defendant thereby also saves the expence of all the intermediate proceedings to judgment in a suit; such as interlocutory judgment, or writ of inquiry or trial, &c.

It seems that bankruptcy and certificate may not prevent the entering up a judgment on a *cognovit*; for the court observed, "that where a man acknowledges the cause of action, the plaintiff may sign judgment at any time. *Wyborne v. Ross*, 2 *Taunt.* 68.

Attention should be paid to the terms of the *cognovit*; for none unexpressed therein will be implied; *Wade v. Rogers*, 2 *Bl. R.* 780; and of course if no terms are expressed, judgment may be signed, and execution issue immediately.

A *cognovit* [without giving time?] by the principal, without notice to the bail, does not discharge the bail. *Hodgson v. Nugent*, 5 *T. R.* 277. But it has since been held; that where the plaintiff had taken a *cognovit* from the defendant, with an agreement to receive the debt by long instalments, of which no notice was given the bail, the court set aside an execution against the bail sued out above a year after the judgment, without a *scire facias* to revive it: even if the agreement by the plaintiff to take the debt by instalments, with the consent of the bail, would not have discharged them; as they could not after that have rendered their principal. *Thomas v. Young and Joggett*, Bail of Graham, 15 *East*, 617. See also *Croft v. Johnson*, 5 *Taunt.* 319. 1 *Marsh.* 59. And it is now settled, that if a plaintiff accepts from the principal defendant a *cognovit*, payable by instalments, the bail are thereby discharged, unless they are parties to the arrangement. *Bowsfield v. Tower*, 4 *Taunt.* 456. But in this case *Chambre, J.*, observed, that a *cognovit* without giving time is not a discharge. *Id.* 458.

But the acceptor of a bill of exchange is not discharged by taking *cognovit* from the drawer. *Fentum v. Pocock*, 1 *Marsh.* 14.

Where the confession was absolute, and an agreement was subsequently made, the court would not interfere to affect the judgment, but left the party to an action on the agreement. *Amon*, 1 *Salk.* 400; but where a judgment on confession is entered up, and execution taken out, contrary to the agreement of the parties, at the time of the confession, the judgment will be set aside, 6 *Mod.* 14. *Hatton v. Young*, 2 *Bl. R.* 949. but if judgment has been signed, without filing common bail for the defendant, according to the statute, till after the term succeeding that in which the writ was returnable, and after the judgment itself has been entered up, yet the defendant having given a *cognovit* is estopped from objecting to the irregularity, if the plaintiff has filed common bail *nunc pro tunc*, before the time of making the objection. *Davis v. Hughes*, 7 *T. R.* 206.

An attorney should be present on the part of a prisoner in the custody of a marshal. *Parkinson v. Caines*, 3 *T. R.* 616. But a *cognovit*, given by a defendant in custody, under mesne process, is valid, though no attorney be present on his behalf, unless advantage was taken of his situation. *Lee v. Thurston*, 1 *Chit. R.* 267.

For, if a defendant, on being arrested by a sheriff's officer, give a *cognovit* to the plaintiff who was the attorney in the cause, without an attorney being present on his part, such *cognovit* is void, although the plaintiff swore that he was unattended by the officer, and that he did not know that the defendant was in custody at the time the *cognovit* was given. *Webb and Yates v. Aspinall*; 1 *J. B. Moore*, 428. *Secus* in C. P. 1 *Chit. R.* 267 (a). And fraud will vacate it. *Id.* 268.

And it does not seem to be in the power of the parties to dispense with certain proceedings previously to the executing the *cognovit*, for in *Walker v. Woolley*, cited 7 *T. R.* 237. n. it appeared that judgment had been signed upon a *cognovit*, without first filing a bill, which was holden to be irregular; but it having been done at the request of the defendant to save expence, the court granted leave to file the bill *nunc pro tunc*, and directed the defendant to pay all the costs.

What necessary to ground *cognovit*.

When by the *cognovit* only a part of a debt is confessed, judgment can only be signed for that part, and the action must proceed for the residue. 1 *Tidd*, 578.

Where *cognovit* for part.

As to how far on the execution of a *cognovit*, the party will be subject to the costs of the first trial, may appear from the case of *Booth v. Atherton*, 6 *T. R.* 144, where, after argument of a special case, the court, because the case was insufficiently stated, directed a new trial; the defendant, without going to trial again, executed a *cognovit*; held, that he was liable to the costs of the former trial.

Where defendant liable to costs of former trial.

It has been ruled, that the assignee of an Irish judgment by *cognovit* may sue in this country in his own name. *O'Callaghan v. Marchioness Thomond*, 3 *Taunt.* 82. And it seems that the Irish statutes, 9 G. II. and 25 G. II. which permit cognisees of judgments to assign them, and the assignees to sue in their own names, are confined to judgments upon *cognovits*. *Ib.*

Of suit here on an Irish judgment on *cognovit*.

PRACTICAL DIRECTIONS, K. B. C. P.

This instrument is often indorsed on the draught of the declaration, or on any of the proceedings; or on any paper distinct from them. No stamp is necessary, unless the *cognovit* contain terms of agreement, as that the debt shall be payable by instalments, &c., and then agreement stamp is requisite, per *Cur. M.* 42 G. III. K. B. 1 *Tidd*, 578. *Ames v. Hill*, 2 B. & P. 150. C. P. *Reardon v. Swaby*, 4 East, 188.

The *cognovit*, conformably with R. H. 2 & 3 G. IV. is, at the time of signing the judgment, to be produced to the clerk of the docket. Then make an incipitur on the judgment paper; there is no occasion for a new roll, where there has been one already on signing an interlocutory judgment, or when carried in. In C. P. file warrant of attorney, if not done before; then tax the costs; and having, pursuant to R. H. 2 & 3 G. IV. above-mentioned, filed the *cognovit* with the clerk of the docket, sue out execution; pay 3s. K. B.; 7s. 4d. C. P.

If the *cognovit* have been executed previously to payment for any entries, the steps taken to sign the judgment are the same as those on signing judgment on a warrant of attorney. See title WARRANT OF ATTORNEY.

FORMS.

Cognovit actionem, or confession in debt.

[*Court.*]

(*Title cause.*)

I confess the debt in this cause, and that the plaintiff hath sustained damages to the amount of — (*the damages laid in the declaration*) besides his costs and charges to be taxed by the master: (or “*by the prothonotary*”) no judgment is to be entered up, or execution to be issued, until the — day of — next in default of payment of the sum of £ — (*the debt really due*) being the debt and interest in this action, together with the said costs; no writ of error is to be brought, nor any bill in equity be filed. If in the default of payment the plaintiff shall enter up judgment, he may levy the said sum of £ —; together with the costs, sheriff’s poundage, and all other incidental charges and expences. Witness my hand, this — day of —, 18—

Witness, —

(*Signature.*)

Form in assumpsit.

I confess this action, and that the plaintiff hath sustained damages to the amount of £ —, (*the damages laid in the declaration*) besides (&c. *as before.*)

Form relata-veri-junctione.

I do hereby consent to withdraw the demurrer by me put in (or *plea by me pleaded*) in this cause, and do confess this action (&c. *as before.*)

COLOUR.

What.

This is a term, respecting the meaning of which at least, the practitioner should be apprised; though it belong more to *pleading than practice.*

To “*give colour*” is where the defendant in his plea sets out his own title (as the better) but pretends, or states colourably, some title to exist also in the plaintiff; but which will of course be inferior in validity to the real title, upon which the defendant intends to rely.

The object sought by thus setting up mere supposititious facts, and deducing therefrom matter in the defendant’s own favour, is to withdraw the consideration of the real point intended to be insisted upon by the defendant from the jury, and thus causing it to be submitted as a question of law to the judgment of the court.

The following illustration is usually adopted. If C. D.’s own true title be by feoffment, with livery from E. F. by force of which he entered on the lands in question, he cannot plead this by itself, as it amounts to no more than the general issue, *nul tort, nul disseisin* in assise, or not guilty in an action of trespass. But he may allege this specially, provided he go farther and say, that A. B. the plaintiff, claiming by colour of a prior deed of feoffment, without livery, entered; upon whom C. P. entered, and may then refer himself to the judgment of the court, which of these two titles is the best in point of law. *Doct. & Stud. 2. c. 53; 3 Comm. 309.* I have forbore to enter further into the doctrine of colour. Perhaps the foregoing might have been spared, but I have known “*colour*” to be a stumbling block in the way of very experienced practitioners, and am not clear that I have removed it.

COMMISSIONERS of Bankrupt. See title WITNESSES.

COMMISSIONERS for auditing public Accounts.

See title WITNESSES.

to take Affidavits.

These are appointed in pursuance of stat. 29 C. II. c. 5, ex- How appointed.
tended to the Isle of Man by the 6 G. III. c. 50. s. 2.

The statute enacts that affidavits in the courts at Westminster may be taken before commissioners appointed by the Lord Chief Justice, or other judges, and the fee is 1s.

The statute therefore points out where the practitioner is to apply for a commission for this purpose. The fees are —.

for taking Recognizances of Bail.

By stat. 4 & 5 W. & M. c. 4, the judges of K. B., or any two of How or by whom
them, whereof the C. J. shall be one, and the justices of C. P. and appointed.
barons of the Exchequer may, by commission, empower persons,
other than common attorneys, to take recognizance of bail in country
causes depending in their several courts.

Application for a commission, therefore, is to be made above.
Fees —.

For what their duty is, see title BAIL. Bail above.

Their duty

COMMISSION OF BANKRUPT. See title BANKRUPT, ante.

COMMITMENT.

A commitment for a contempt under warranty, being a commitment for a punishment, must express a time certain; and consequently a commitment for a contempt, till the defendant is discharged by due course of law, is bad. *Rex v. James*, 5 B. & A. 894.

COMMITTITUR.

See title BAIL, *Surrender in Discharge of Bail*, ante.

The plaintiff must give notice of his having abandoned a former committitur which is erroneous, before he enter a second, rectifying a mistake. *Topping v. Ryan*, 1 T. R. 227.

The defendant may voluntarily come in and render himself; and the proceedings, with respect to the commitment and committitur, thereon are the same, as when the render is, as it usually is, in discharge of the bail.

On a render in discharge of bail, the committitur is made out by the judge, and sent with the defendant to the K. B. prison. The entry in the marshal's book is made by the clerk of the papers. *The King v. Sheriff of Middlesex*, 1 Chit. R. 364.

Where defendant is already in custody, and is sought to be charged in a new action, the committitur is entered with the clerk of the judgments. *Id.*

Where defendant is removed by *habeas corpus* from the Fleet prison to K. B. no committitur is entered. *Id.* 365.

COMMITTITUR PIECE.

See title PRISONER. *Proceedings against Prisoner.*

PRACTICAL DIRECTIONS.

Having obtained the marshal's or the warden's acknowledgment that the defendant is in his custody, the committitur is to be entered. It is to be

COMMITTITUR PIECE, &c. COMMON PLEAS, &c.

written on a piece of unstamped parchment, similar to a bail-piece. On or before the last day of the term in which the prisoner is to be charged in execution, it must be filed with the clerk of the judgments, who shall enter such committitur on the judgment roll within four days after the end of such term, exclusive of the last day of the term, unless the last of such four days be Sunday, and in that case within five days next after the end of such term; and in default thereof such prisoner shall be entitled to be discharged. R. E. 41 G. III. The plaintiff's attorney should see the entry made. *Pardon v. Brockridge*, 2 B. & C. 342; but this rule does not extend to the case of a prisoner committed under a habeas corpus, in which no committitur piece is ever necessary. *Pitches v. Fawcett*, T. 43 G. III. cited 1 Tidd, 371; pay on filing 2s.

Previously to filing the committitur, it is usual to enter the same in the marshal's book; pay 6d.; but such entry is not necessary. Imp. K. B. 687. *The King v. Sheriff of Middlesex*, 1 Chit. R. 360.

The plaintiff must give notice of his having abandoned a former committitur, which is erroneus, before he enters a second rectifying the mistake. *Topping v. Ryan*, 1 T. R. 227.

FORMS.

———— Term — G. IV.

No. 1.
A committitur
piece.

(Venue) (to wit) ——— is committed to the custody of the marshal, &c. in execution at the suit of ———, in a plea of ———, (as the case may be) for £—— damages, (if in debt, say, for £——, and £—— damages) there to remain until, &c.

Judgment of (term) G. III. Roll ———

No. 2.
Entry of the
committitur.

———— attorney for plaintiff ———
Afterwards, to wit, on ——— next after ———, in the ——— year of the reign of our lord the now king, before our said lord the king at Westminster, comes the said ——— in his proper person, and the said ——— being then present here in court at the prayer of the said ———, by the court of our said lord the king now here, is committed to the custody of the marshal of the Marshalsea of our said lord the king, before the king himself, in execution for the damages, (if in debt, for the debt and damages) aforesaid, there to remain until the said ——— shall be fully satisfied the damages (or, if in debt, "debt and damages") aforesaid.

COMMON PLEAS, Court of.

The first establishment of a judicial authority in some certain place, to be exerted in the name of the king, must have been of great importance in an age, that of king John, when the administration of justice was so little reduced, or perhaps reducible, to principle. Immediately previously to that period, the interference, or the dispensations of a court, were in general summary, and conclusive; but occasionally, it must have been lamented, that circumstances were often too complicated, and a reference to floating opinions of the day too unsafe, to warrant an expectation that an adjudication founded upon the true principles of jurisprudence, and reconcilable with laws and customs sometimes insulated, and frequently opposed even with reference to the same facts, to each other, could always take place.

The local establishment of one central court soon drew around it professors and practisers of law; and from this concentration of legal

knowledge the utmost bounds of the kingdom were to experience the salutary light of jurisprudence diffusing itself with steadiness and regularity; for, to the establishment of this court is attributed that also of the inns of court. These collectively form an university for the teaching and acquiring the principles and the practice of the law of England, whether viewed in its more straightened limits of the common law, or in its more extended but less defined limits of equity.

To the court of Common Pleas it may become the lawyer, and indeed all who benefit by the due administration of the law, which is the whole body of the people of England, to look with reverential affection; to regard it as the first sacred deposit of those solid principles for the regulation of civil rights, which now influence judicial decisions. To this court our contentious, and perhaps mutable ancestors paid great homage; neither kings, nor parliaments, nor even legislatures amidst their innovations or usurpations upon all other authority, and upon the authority of each other, have violated some of its exclusive jurisdictions; all certain alienations or dispositions of landed property by forms on record, are yet properly within the original cognizance of this court, and of this court only; but above all, it should be remembered, that it is to "the critical establishment of this principal court at this particular juncture and at that particular place," we owe the preservation of the common law from the contagious influence of canonists and civilians; a great and once a powerful body, always the abettors and mostly the allies of tyranny and superstition, and whose utmost efforts were then, although ultimately unavailing, employed to annihilate it.

An inestimable example was also set to the whole of civilized Europe; for in France, and subsequently, though somewhat long after, in Germany, were established principal courts of justice, to be held in a certain place, which ever before, as in this kingdom, had followed the king's person. But most of the people of the continent of Europe still submit to remain the abject victims of the worst remnants of the feudal system; the rights or rather the wrongs of primogeniture, inalienable; and above all and worst of all, governments not as of office and duty, but as of right.

Common Pleas include all civil actions between subject and subject, and they are the proper object of this court, which is a court of record, and styled by Sir Edward Coke, 4 *Inst.* 99, the lock and key of the common law; for herein only, can real actions, that is, actions which concern the right of freehold, or the realty be originally brought, and all other, or personal pleas between man and man, are likewise here determined, though in most of them the King's Bench has also a concurrent authority. Its jurisdiction,

The jurisdiction of this court extends throughout England, and is exercised, 1. By original writ, issued out of Chancery, and returnable in this court, see title ORIGINAL, SPECIAL, C. P. or a common original in trespass *quare clausum fregit*. See title QUARE CLAUSUM FREGIT. 2. By *capias quare clausum fregit*, or *capias ad respondendum*, which titles see. 3. By attachment of privilege at the suit of attornies and officers of the court. See title ATTORNEY, *ante*. 4. By Bill. See title BILL, and the other references there made.

This court may also grant prohibitions to restrain, as well temporal as ecclesiastical courts, within their proper bounds and jurisdictions; this was once doubted, but Sir Edward Coke reports that in *H. 2 J. I.* it was decided "that for a long time, and in many successions of reverend judges prohibitions upon information, without any other plea pending, have been granted, issues tried, verdicts and judgments given, upon demurrer," by the court of Common Bench, and that it was unanimously agreed, to "give no opinion against the jurisdiction of the court of Common Bench in this case." The great reporter adds "*Et magna est veritas et prevalet.*" 12 *Rep.* 109.

Actions in inferior courts of record may therefore be removed into this by writ of *habeas corpus cum causa*, or by writ of *certiorari*; and actions in inferior courts not of record may be removed by *pone, toll, recordari, accedas ad curiam*, or by writ of false judgment, and it was solemnly decided that this court had a general jurisdiction to grant writs of *habeas corpus* in all cases whatsoever. *Wood's Case*, 3 *Wils.* 172; but for error, or mistake of the judges, error lies to K. B. from C. P. at Westminster, 4 *Inst.* 22; but errors lie not from an inferior court to C. P. 3 *Comm.* 411.

Of cases sent
from equity to
C. P.

Cases out of Chancery sent to be argued in this court, cannot be set down nor heard unless signed by a serjeant. *Vanfan and Wife v. Legh*, 7 *Taunt.* 85.

And whatever number of parties there may be to a suit in equity, out of which a case is directed for this court, the court will hear only one counsel on behalf of each separate interest. *Bettison v. Rickards*, *Id.* 105. 2 *Marsh.* 413. S. C.

A memorable instance of the exercise of the summary jurisdiction of this court may be here mentioned.

Lieutenant Frye of the marines was in the year 1743 sentenced to fifteen years imprisonment by a court martial. For this monstrous sentence he brought an action against the president of the court martial, and recovered £1000 damages.

Influenced probably by observations made by the judge who tried the cause, the plaintiff commenced actions against other members of the same court who had passed the sentence, and they were arrested by *capias* C. P. at the breaking up of the court martial against Admiral Lestock, of which they had also been members. This court martial took upon itself to pass some resolutions reflecting on Sir John Willes, C. J. C. P. which were laid before the king; upon this the C. J. caused every member of the court to be taken into custody, and was proceeding to assert and maintain the authority of his office, but a written submission, signed by all the members of the court, stayed the hand of insulted justice. The submission transmitted to the lord chief justice in court was ordered to be read in open court, and to be registered in the remembrancer's office, and it also appears in the gazette of 15th November, 1746. "A memorial, observed by the Lord Chief Justice, to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken."

The style of the court is thus stated, *viz.* Pleas at Westminster The style. before Sir William Draper Best, knight, and his companions, justices of our lord the king of the Bench, &c. 3 *Comm.* 37. *Rich. C. P. Crompt. Introd. passim. G. C. P.*

An allegation that an action was depending in his majesty's court of the Bench at Westminster, is not sustained by proof of a *pluries* bill of Middlesex, for by such allegation the Common Bench must be intended. *Impey v. Taylor*, 9 *M. & S.* 166.

The judges who at present preside in this court are, The Honourable Sir William Draper Best, knight, lord chief justice, The judges. The Honourable Sir James Allan Park, knight, the Honourable Sir John Richardson, knight, the Honourable Sir William Burrough, knight.

The official establishment of the court consists of the *custos brevium*, three prothonotaries, three secondaries, the clerk of the judgments, the clerk of the dockets, the clerk of the reversals, the clerk of the treasury, the clerks of the jurats or under clerks of the treasury, and treasury keeper, the filazers, the clerk of the warrants, the clerk of the essoigns, the clerk of the juries, the clerk of the inrolment office, the clerk of the king's silver, the chirographer, the exigenter, the clerk of the outlawries, the prothonotary for Monmouth, the sealer of the writs, the clerk of the errors, the judges clerks, the associate at *nisi prius* in London and Middlesex, the marshal at *nisi prius* in London and Middlesex, the crier at *nisi prius* in London and Middlesex, the chief proclamator, the four criers, the court keeper, the porter of the court, the warden of the Fleet, the clerk of the papers of the Fleet prison, the tip-staffs, commissioners for taking affidavits, commissioners for taking bail, attornies.

COMPERUIT AD DIEM, *Plea of*.

The title, meaning *defendant appeared at or on the day*, by which What. a plea to a bail bond is known; but where the recognizance is fraudulently entered on the roll, for the purpose of defeating an action on the bail bond, brought by the sheriff, the court ordered it to be taken off. See *Leigh v. Bartles*, 6 *Taunt.* 167.

PRACTICAL DIRECTIONS.

This plea, engrossed on a 4d. stamp is, in both courts, delivered, not filed; for if filed, judgment may be signed as for want of a plea. Row-sell v. Cox, 2 R. & A. 892. 1 Chit. R. 211. S. C. requires no signature: of course, therefore, the issue and trial record, no such record, may be made up by the attorney.

FORM.

[Court.] And the said _____, by _____ [Term, &c.] his attorney, No. 1. at the suit of _____ comes and defends the wrong and injury when, &c. Plea of *comperuit ad diem.* and says that the said _____ ought not to have or maintain his aforesaid action thereof against him, because he says that the said _____ did appear before the lord the king before the king himself at Westminster, on _____, in the said condition of

the said writing obligatory mentioned, according to the form and effect of the said condition, as by the record of the said appearance, remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears; and this the said _____ is ready to verify by the said record, wherefore he prays judgment if the said _____ ought to have or maintain his aforesaid action thereof against him, &c.

See title NUL TIEL RECORD.

Issue on the
above plea.

Statute 18 Eliz.
c. 5.

COMPOUNDING PENAL ACTIONS.

By stat. 18 Eliz. c. 5. s. 3. made perpetual by stat. 27 Eliz. c. 10. no common informer or plaintiff shall or may compound or agree with any person that shall offend, or that shall be surmised to offend against any penal statute, for an offence committed, or pretended to be committed, but after answer made in court unto the information or suit in that behalf exhibited or prosecuted; nor after answer, but by the order or consent of the court, in which the same information or suit shall be depending, upon the pains and penalties therein set down and declared, that is to say, by s. 4. such informer is on conviction to stand in the pillory for two hours, and shall for ever be disabled from being plaintiff or informer in any penal action, and forfeit 10*l.* half to her majesty, and half to party grieved.

This statute only extends to the common informer, and not to the party grieved. 1 *Salk.* 30; *vide* also s. 6. of the statute. *Hawk. P. C.* 279.

The application under this statute may, under circumstances favourable on the part of the defendant, be made even after verdict. *Maughan, q. t. v. Walker*, 5 *T. R.* 98. Where the poverty of the defendant was alleged, it was allowed, though the defendant was in execution. *Bradshaw v. Mottram*, 1 *Str.* 167. See also *Crowder v. Wagstaff*, 1 *B. & P.* 18, where C. P. said, it lay with the defendant to shew the circumstances which might entitle him to such an indulgence.

Leave to compound is entirely, therefore, discretionary with the court whether to grant it or not. *Howell, q. t. v. Morris*, 1 *Wils.* 79.

Leave is often refused or withheld, as in the above case of *Crowder v. Wagstaff*, and in the case of *Bellis v. Beale*, *M.* 38 *G. III.* cited 1 *Tidd*, 175, it was refused; the action was brought on statute 25 *G. II.* c. 36. for keeping a disorderly house; and where part of the penalty was given to the poor, the court refused leave to compound, although the overseers assented, saying, that they would not permit this assent to be made effectual, for that overseers were trustees for the parish, and they could not give up the money. And see *Hunson, q. t. v. Sprange*, 2 *Smith R.* 195.

Where the court give leave to compound a penal action, the king's half of the composition shall be paid into the hands of the master of the Crown office for the use of his majesty. *Brown v. Bailey*, 4 *Burr.* 1929. *Wood, q. t. v. Ellis and Another*, 2 *Bla. R.* 1154. but in compounding a penal action on stat. 20 *G. III.* c. 51. (the post-horse act) which gives costs to the prosecutor, the

prosecutor was allowed to receive the deficient duties (not amounting to 40s.) and full costs of suit, though together exceeding the 40s. paid to the crown. *North, q. t. v. Smart*, 1 B. & P. 51. and by R. E. 33 G. III. "every rule to be drawn up for compounding any *qui tam* action, do express that the defendant doth undertake to pay the same, for which the court has given him leave to compound such action;" of course therefore should he not pay such sum, the defendant will be liable to an attachment. *The King v. Clifton*, 5 T. R. 257.

And where a penal statute gives no costs, but the action is compounded by paying equal moieties to the king and to the plaintiff, and also costs to the plaintiff, the king shall have half the costs also. *Lee v. Cass*, 2 Taunt. 213.

And the court will not stay proceedings in a penal action brought on stat. 54 G. III. c. 6. until after declaration be delivered, or its otherwise appearing that the action is brought on that statute. *Wright, q. t. v. Lloyd, Clerk*, 5 Taunt. 304. See also *Wright, q. t. v. Whalley, clerk*, *Id.* 395. nor after he obtained leave to compound before that statute passed. *Wright, q. t. v. —, clerk*, 5 Taunt. 306.

PRACTICAL DIRECTIONS.

The plaintiff's attorney makes the application on an affidavit. See FORM subjoined, which is to be given to council with instructions entitled in the cause, "To move for leave to compound," and the rule is thereupon made; but previously to its being drawn up, the king's moiety must be paid by the defendant into the hands of the master of the Crown-Office; or if the action be in C. P. into the hands of one of the prothonotaries, for his majesty's use; and it seems that where entitled to a part of the penalty, the consent of the crown must be signified through the medium of a king's counsel. Sheldon, q. t. v. Mumford, 5 Taunt. 268.

FORM.

(Court.)

(Title Cause.)

_____ of _____, plaintiff above named, maketh oath and saith, that this action is brought for the recovery of a certain penalty (or penalties as the case may be) amounting to the sum of £——, surmised to have been incurred by the defendant above named, upon and by virtue of an act of parliament made and passed in, &c., intituled, &c. (here the affidavit must mention the stage of the action, as to whether it be before or after declaration, plea, issue, or verdict; if before declaration he may say, "but this deponent hath not as yet declared in the said action;" if after declaration, and before plea, he may say, "and this deponent hath filed a declaration in the said action against the defendant, but who hath not as yet pleaded thereto," &c. &c.) And this deponent further saith, that it hath been agreed between this deponent and the said defendant, that an application should be made to this honorable court by and on the behalf of this deponent and the said defendant for leave to compound the said action, upon the said defendant's paying the sum of £—— (half the composition) to our lord the now king, and the sum of £—— to this deponent; together with the costs of this action, and of the present application, to be taxed by the proper officer (whatever is the agreement between the parties should be here stated): And this deponent further saith that

CONCILIUM OR CONSILIUM; PR. DI.

what is above stated to be the agreement between this deponent and the said defendant, respecting the compounding the said action, contains wholly and truly the terms upon which this action is intended to be compounded by them: And this deponent saith that he hath not, nor hath nor have any other person or persons for his use, received any sum or sums of money whatever for or on account of compounding the said action, nor is nor are any other person or persons by his order, or by his appointment, or for his use, or for the use of any other person or persons to his knowledge, or with his privity and consent, at any time or times, hereafter to have or receive for and on account of compounding the said action, more than the aforesaid sum of £ ——— and the costs, to be taxed as above mentioned.

Sworn ———

(Signed.)

COMPULSIVE CLAUSES IN LORD'S ACT. See title **INSOLVENT DEBTOR.**

COMPUTE. *Reference to compute.* See titles **BILL OF EXCHANGE** and **PROMISSORY NOTE. BOND. COVENANT. LEASE. RENT.**

CONCILIUM OR CONSILIUM. *Dies concilii.*

What.

A day allowed for one accused to make his defence; an imparlance, 4 *Comm.* 356, n.

The moving for a concilium is a proceeding in the cause sufficient to save a term's notice. *Bland v. Darley*, 3 *T. R.* 530.

See title **DEMURRER**, *Argument of.*

PRACTICAL DIRECTIONS, K. B.

Demurrer being joined, obtain a roll; enter the warrants of attorney, and also copy the whole demurrer book thereon. The entry is to be made as of the term in which the book is delivered. Having entered the pleadings with the clerk of the dockets, and docketed the roll, he will mark the same. See title DOCKET, DOCKETTING THE ROLL.

*Indorse court, cause, &c. on an instruction paper or brief, also "to move for a consilium." Give same to counsel. He signs the motion paper or brief; fee 10s. 6d. The roll and motion paper are then to be taken to the clerk of the papers; he marks the roll "read," the motion paper is also to be signed by him, and the clerk of the rules thereupon draws up the rule for the consilium, which is a four day rule; pay 6s. 6d. Having obtained this rule, carry same to the clerk of the papers; the demurrer is by him entered for argument; pay 1s. and as soon as may be serve copy of rule on the opposite attorney. The authority against the necessity of this service, and that it is the defendant's duty to search, viz. *Forbes v. Lord Middleton*, 2 *Str.* 1242, also *Harris v. Whitechurch*, 1 *Chit. R.* 718, is express. And an erroneous copy, where no argument is intended, is to be considered as no copy, 1d. ib.; but *Mr. Impey*, page 355, says, "I have asked the master, who says that the rule ought to be served where there is a real demurrer," and see *R. M.* 30 *G. II.* to this effect.*

It may be remarked that either party may move for the consilium.

PRACTICAL DIRECTIONS, C. P.

These are nearly the same, but not quite.

The proceedings as above being entered on the roll, are docketed at the prothonotaries; pay 8d. per sheet. Take care that the roll be in court on

the day of the motion for the consilium, and on the serjeant's handing the motion paper to the secondary, he will mark the roll as read in court; draw up the rule at the secondary's; serve copy. The demurrer is set down for argument with the secondary; pay 1s.

CONFESSION. See title COGNOVIT, JUDGMENT BY.

CONSOLIDATION RULE.

A rule for the consolidation of actions is a proceeding for the purpose of preventing the expence attending the prosecution of several actions depending upon precisely the same facts, and to be determined upon precisely the same general principles of law. What.

The introduction of the practice in insurance causes is attributed to Lord Mansfield; and so justly tenacious of its continuance are the courts, that if the plaintiff will not consent to a rule for this purpose, they will grant imparlances in all the actions but one, till the plaintiff have an opportunity of proceeding to trial in that action. *Parke's Insur. Introd. Brown v. Newnham, E. 25 G. III. 1 Tidd, 636*; but if the plaintiff consent to the application for the rule, the defendants must agree to admit the policy, and produce and give copies of books and papers, and must also undertake not to file a bill in equity, or bring a writ of error. The terms.

But a declaration, containing 98 counts upon as many promissory notes for 1l. each cannot be consolidated into one count; but a rule was made for striking out all the counts but one, and giving the notes in evidence under the account stated. *Cermach v. Gundry, 1 Chit. R. 709.*

But if the court open a consolidation rule, and try a second cause, they will extend to the second trial all such terms made compulsory on the party successful in the first cause, as are requisite for attaining the merits. *Cohen v. Bulkeley, 5 Taunt. 166.* Terms of opening rule.

The same practice of consolidating actions is adopted where ejectment there are two or more actions on the demise of the same lessor of the plaintiff for the same premises. *Doe, d. Pulteney v. Cavan, Imp. K. B. 731. Same v. Freeman, Sell. 229.* Wherein other cases adopted.

When a consolidation rule has been entered into, though fresh evidence be discovered, the court will not permit the plaintiff to try the other actions. *Pullen v. Parry, 1 Chit. R. 709. n.* The like.

The rule was denied where three actions were brought on three notes of hand due at different times; *Mussenden v. O'Hara, Tidd, 635*; also in trespass against several defendants, *Bayley v. Raby, 1 Str. 420*; and the reason assigned by the court was, that by so doing, the defendants would be deprived of each other's testimony. But now it seems otherwise; for two actions for trespass on the same premises at different times were consolidated, and the plaintiff compelled to pay the costs. *Anon. 1 Chit. R. 709. n.* Where denied.

A consolidation rule was set aside on the ground of the absence of a material witness at the trial, on bringing the money into court. *Id. 710. n.* When set aside.

But it was denied in actions for bribery. *Benton v. Prasad, 1 Smith R. 423.*

So also in feigned issues under an inclosure act, where the parties, having conflicting interests, sued in different counts and by different attorneys. *Cranmer v. Pennington, 5 Taunt. 167.*

The verdict must be good.

But though the defendant consent to abide by the verdict that shall be given in the one cause, yet it must be such a verdict as the court may think ought to stand on a final determination. *Hodson v. Richardson*, 3 *Burr.* 1477.

When a consolidation rule has been entered into, though fresh evidence is discovered, the court will not permit the plaintiff to try the other actions. *Pullen v. Parry*, 1 *Chit. R.* 709. n.

Where error brought in the cause tried.

Where several causes are consolidated, if a writ of error be issued in the cause tried, and execution taken out for want of bail in error being duly put in, and the writs of error be issued in the other causes, and bail duly put in, execution in those causes is thereby stayed, for the consolidation roll only relates to the verdict. *Aylwine v. Favine*, 2 *N. R.* 430.

And where the defendant having entered into a consolidation rule, and the plaintiff obtained a verdict on the cause tried, which was afterwards turned into a special verdict to enable the defendant to remove it by a writ of error to K. B., which was done, and bail regularly put in, this court stayed execution in the action against the defendant till the determination of the writ of error had been known, on his giving security to be bound by the judgment of K. B. *Gill v. Hinkley*, 1 *J. B. Moore*, 79.

Where plaintiff discontinues an action stayed by the rule, and commences another.

If a plaintiff discontinue an action stayed in another court by a consolidation rule, and commence an action against the same defendant for the same cause in this court, the court will stay proceedings until after the trial of the cause mentioned in the consolidation rule. *Parkin v. Scott*, 1 *Taunt.* 565.

Where plaintiff not allowed costs.

Where the defendants in several actions paid money into court, which the plaintiff took out without taxing the costs at that time, and after the common consolidation rule being made, the plaintiff was nonsuited in the action that was tried; it was held that he was not entitled to the costs in any of the actions up to the time of the paying money into court. *Burstall v. Horner*, 7 *T. R.* 372.

But in *Twemlow v. Brook*, 2 *Taunt.* 361, it was held that the plaintiff was entitled to the costs in the short causes up to the time of paying the money into court.

And in actions upon a policy of assurance against several underwriters, where the parties had not entered into a consolidation rule, the attorney for the plaintiff made out a full brief in one cause, but only a short statement in the rest; and the master on taxation having allowed for full brief in all the causes, the court of K. B. made a rule for him to review his taxation. *Martineau v. Baraes and Others*, *H.* 23 G. III. K. B. 1 *Tidd*, 637.

PRACTICAL DIRECTIONS.

The rule is obtained in term time by a motion for a rule nisi; in vacation by a summons to shew cause. Motion paper, on which is written the titles of the several causes, is also indorsed, "To move for a rule to shew cause why the within actions should not be consolidated." The usual affidavit of service is of course necessary on moving to make a rule absolute, or for obtaining order in vacation. The rule is made absolute, or order is made upon the terms above mentioned; (If necessary, see titles MOTION, SUMMONS) but all motions, rules, summonses, and orders must be paid for separately.

In case of verdict for the plaintiff in the one cause, the costs are taxed of course; and if the defendant's attorney will attend the master or prothonotary, the costs in the other causes also. These, with the debts, must be paid; but if the defendant's attorney will not attend, application must be made to the court on an affidavit of the facts (one affidavit stamp will be sufficient) for leave to enter up the judgment and take out execution thereon; also that the master or prothonotary may tax the costs in all the causes, and that the defendants may pay the costs of the application also to be taxed. Counsel or serjeant's fee discretionary. The rules are to be drawn up, and copies served. On non-compliance therewith, judgment in each action is to be signed, and execution issued in the usual manner.

CONSTABLE AND HEADBOROUGH.

By statute 24 G. II. c. 44. s. 6. no action shall be brought against any constable, headborough, or other officer, or against any person acting by his order, and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until demand made or left at the usual place of his abode by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand; and in case, after such demand and compliance therewith, any action shall be brought against such constable, &c. without making the justice who signed or sealed the said warrant defendant; that on producing and proving such warrant at the trial of such action the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice; and if such action be brought jointly against such justice, and also against such constable, &c. then, on proof of such warrant, the jury shall find for such constable, &c. notwithstanding such defect of jurisdiction as aforesaid; and if the verdict shall be given against the justice in such case, the plaintiff shall recover his costs against him, to be taxed in such manner by the proper officer as to include such costs as the plaintiff is liable to pay to the defendant for whom such verdict shall be found.

Statute 24 G. II.
c. 44. s. 6.

The words of the statute are not only in favour of the constable, &c. but also in that of other officer, or any person acting by his order, &c.; and, therefore, it was held, that if an officer (in this case a police officer) seize goods in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued until a previous demand be made of a copy of it. *Price v. Messenger*, 2 B. & P. 158. A constable executing the warrant of a justice of peace, if sued in trespass without the magistrate, is within the protection of the statute and entitled to a verdict on proof of such warrant, having first complied with the plaintiff's demand of a perusal and copy of it before the action brought, though not within six days after such demand, as the act directs. *Jones v. Vaughan*, 5 East, 445.

Officers within
the statute.

And some constables, under a warrant to search a house for black cloth which had been stolen, finding no black cloth, took cloth of other colours and carried it before a magistrate, refusing

at the same time to tell the owner of the house searched whether they had any warrant or no: Held, that they were within the protection of the statute 24 G. II. c. 44, and that an action against them ought to have been commenced within six months after the grievance complained of. *Smith v. Wiltshire*, 2 B. & B. 619.

But replevin is not an action within the statute. *Fletcher v. Wilkins*, 6 East, 283. Nor is the officer within the protection of the statute, if the act committed by him were not in obedience to the warrant; for where defendants, in order to levy a poor's rate under a distress granted by two magistrates, broke and entered the house, and broke the windows, &c. it was held that they might be sued in trespass without a previous demand of the perusal and copy of the warrant. *Bell v. Oakley and eight others*, 2 M. & S. 259.

Officers not within it.

Cases have also occurred where it was decided that the officers were not within the protection intended by the statute; as where a borsholder took upon himself to execute out of his own hundred a warrant directed to the constable of another hundred by name, and "to all other officers of the peace in the county of Kent." *Blatcher v. Kemp*, 1 H. Bl. 15, n. Also where goods were distrained under a warrant granted by a justice of peace for Kent, directed to the constables of a certain district in that county, if it be fact that the warrant was executed within the jurisdiction of the Cinque Ports, and not in the county of Kent, the constables who executed it may be sued in trespass, without the magistrate being made a defendant, as is required by the above statute.

To what the statute is limited.

The statute is limited to trespass and tort. In an action for money had and received against an officer who had levied on a conviction by a magistrate subsequently quashed, a demand of a copy of the warrant was held unnecessary. *Bul. N. P.* 24.

Where without reference to the statute, constable not liable.

Where a constable, having a magistrate's warrant of distress to levy a church-rate under the statute 55 G. III. c. 127, broke the door of plaintiff and entered his house: Held, that although he thereby executed his authority, yet that no action could be maintained after the expiration of three calendar months. 1 B. & A. 227.

Evidence of demand.

If the plaintiff's attorney make out two papers precisely similar, purporting to be demands of copy pursuant to the statute, and sign both for his client, and then deliver one to the defendant, the other will be sufficient evidence at the trial. *Jory v. Orchard*, 2 B. & P. 39. See titles CHURCHWARDENS. COSTS.

FORM.

Mr. —

No. 1.
Form of a demand of a perusal and of a copy of the warrant under the statute.

According to the form of the statute in such case made and provided, I, as attorney for Mr. —, and by his direction, do hereby demand of you the perusal and copy of the warrant, under and by virtue of which you did on the — day of — last, seize and take (*here briefly describe the things*) being the goods and chattels of the said — (*or if the person were taken into custody, say,*) into custody the said —, and convey him before —, esquire, one of his majesty's justices in the commis-

CONSTABLE, &c. FORM. CONSULTATION.

371

sion of the peace, in and for the county of _____. Dated this _____ of _____, 182_____.

Your's, &c.

To Mr. _____

attorney for the said _____

*If the party were committed to, and confined in gaol, and it be intended to commence an action against the gaoler also, copy the above demand of the warrant down to the asterisk; * then say*

_____ of commitment and detainer, by virtue of which you received into your custody the person of the said _____, on the _____ day of _____ last, and also detained the person of the said _____ for the space of _____ days immediately following. Dated this _____ day of _____ 182_____. No. 2. Demand of personal, &c. of gaoler.

Your's, &c.

To Mr. _____

attorney for the said _____

CONSULTATION. *Writ of Consultation.*

Statute 24 E. I. recites that ecclesiastical judges have often surceased to proceed in causes moved before them by force of the king's writ of prohibition, in cases where remedy could not be given to complainers in the king's court by any writ out of chancery, because that such plaintiffs were deferred of their right and remedy in both courts, as well temporal as spiritual, to their great damages, like as the king hath been advertised by the grievous complaint of his subjects; the statute then enacts, that where ecclesiastical judges do surcease in the aforesaid cases by the king's prohibition directed unto them, that the chancellor or the chief justice of our lord the king for the time being, upon sight of the libel of the same matter, at the instance of the plaintiff, if they can see that the case cannot be redeemed by any writ out of the chancery, but that the spiritual court ought to determine the matters, shall write to the ecclesiastical judges before whom the cause was first moved, that they proceed therein, notwithstanding the king's prohibition directed to them before.

Its origin and use. Statute 24 E. I.

The prohibition is granted on suggestion of the party that the cause is wrongfully entertained in the ecclesiastical court.

In a tithe cause, where prohibition to the ecclesiastical court has been granted, the statute 2 & 3 Edw. VI. c. 13. s. 14. and which has been construed to extend to small tithes as well as to great, *Foy v. Listér*, 2 *Ld. Raym.* 1172. enacts, that "in case the suggestion be not proved true by two sufficient witnesses at the least in the court where the prohibition shall be granted, within six months (calendar, not lunar months, *S. C. ubi supra*) after it is so granted and awarded, then the party who is hindered of his suit in the ecclesiastical court by such prohibition shall, upon his request and suit, without delay, have a consultation granted in the same case in the court where the prohibition was granted, and shall also recover double costs and damages against the party that pursued the prohibition, to be assigned or assessed by the court where the consultation shall be granted."

Where granted on 2 & 3 E. VI. c. 13. s. 14.

Import of the writ.

The title of the writ of consultation imports this, that the court ought, upon consultation, to award it. *Nicholas Fuller's case*, 12 Co. 44.

Doubtful where it now lies.

Mr. Tidd, vol. ii. page 960, to shew that it is doubtful whether consultation lies on the statute 2 & 3 Ed. VI. c. 13. s. 14. cites *Salter v. Greenaway*, T. 22 G. III.; and referring to what fell from Buller, J. in the same case, adds, that if the six months be understood to relate to the trial only, it must be with some latitude, as in the case of suits in the northern counties, or of prohibition issuing in Trinity term.

Where it lies.

If a prohibition were granted without the party having had notice to contradict it, the court would not compel him to appear and plead thereto, as is the usual course in such cases, but upon motion would grant a consultation. In citing this case, Mr. Crompton states it to be a condition for granting the consultation, that no cause for the prohibition must exist. *Smith v. Executors of Poyndrell*, Cro. Car. 97.

So, after a prohibition granted, if upon trial the matter be found for the defendant generally, a consultation shall go.

So if the matter found for the defendant vary in words, but not in substance, from the suggestion.

So if there be a material variance between the suggestion for a prohibition, and the libel in the spiritual court, there ought to be consultation; for the prohibition ought to be founded upon the libel. *Hutton v. Barnes*, Yelv. 79.

So if there be a variance in quantity. *Id. ib.*

So after a prohibition granted, if it appear that the spiritual court has consueance for part, a consultation shall go *quoad*. *Nicholas Fuller's case*, 12 Co. 44.

No consultation can be granted out of term even by all the judges; nor by any of them within the term out of court. *id.*

In *Hind v. The Bishop of Chester*, Cro. Car. 237. it was ruled that after a declaration in prohibition, a writ of consultation should not be granted upon motion before plea or demurrer.

Nor where a verdict is found for the defendant, if it appear upon the whole matter that the spiritual court has no consueance, *Berrie's case*, Hob. 192. 2 Rol. 320, l. 5. 15.

So if the suggestion were of unity *ratione cujus*, he shall be discharged, and a verdict find that he shall not be discharged *ratione inde*, though it be against the plaintiff, yet being impertinent, for the fact to be tried was, whether there were a unity, &c. a consultation does not go, 2 Rol. 320. l. 35. *Priddle and Napper's case*, 11 Co. 15. 1.

So though there be an immaterial variance between the suggestion and the libel, a consultation does not go. *Hutton v. Barnes*, Yelv. 79.

So if the suggestion vary in quantity from the libel, if it be conformable to the copy of the libel delivered by the spiritual court, this variance shall not be a ground for a consultation, 2 Rol. 320. l. 45.

So if a *modus* be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant. But if any *modus* be found, though different from that laid, that is a ground

for the court to refuse a consultation. *Brock v. Richardson*, 1 T. R. 427.

It would be extending this title too much to add notes of those cases in this place, where or where not other or second prohibitions have been granted after a consultation, but some will be found under title PROHIBITION.

PRACTICAL DIRECTIONS.

This proceeding, though not obsolete, is infrequent. The writ of consultation is granted only upon motion; for an affidavit of the grounds upon which it is moved, seems to be necessary; but whether it be a rule nisi may depend upon the period of the cause at which application is made for the consultation. Where on the trial of the prohibition a verdict shall have been found for the plaintiff, the rule is, I believe, absolute in the first instance; being very much in the nature of a rule for judgment, an affidavit of the service of a notice of the motion may be made and produced on such application for the writ. Where the prohibition shall have issued by surprise, an affidavit of the facts should be made, and given to counsel or serjeant, with instructions to move for a rule to shew cause why the writ of prohibition should not be quashed, and a writ of consultation issued. Fee proportioned to the length of the instructions, as in other cases, not of course.

The rule is then drawn up and copy duly served.

On the day mentioned in the rule be prepared with an affidavit of service of the copy of the rule annexed, and give same to counsel or serjeant, with instructions to move to make the within rule absolute. Fee as above.

This being done, draw up the rule and prepare the writ of consultation. It is engrossed on parchment; make precept and carry same to the signer of the writs, K. B. pay him 5s. 8d. signing; or the filazer, C. P. seal 7d.; deliver the writ, keeping a copy thereof, to your proctor, to whom the further proceeding in the cause will thence necessarily be committed.

FORM.

George, &c. To _____ (the direction must be to the judge of the ecclesiastical court to whom the prohibition was directed): Whereas _____ lately in the court Christian before you, impleaded one _____ (here describe the party as previously described in the proceedings in the ecclesiastical court, and go on to recite the substance of the libel) as by the said libel will more fully appear: And whereas the said _____ hath lately prosecuted and caused to be directed to you our certain writ of prohibition out of our court before our justices at Westminster, whereby you were prohibited from further holding the plea aforesaid in the said court Christian before you, or from proceeding farther therein in that behalf (the prohibitory part of the writ of prohibition should be correctly stated): And whereas by pretence of our said writ of prohibition you have from thence hitherto delayed, and yet delay farther to proceed in the said cause therein mentioned, as we are informed, to the great damage of the said _____, and also to the great prejudice of the ecclesiastical liberty: Whereupon the

Form of writ of consultation.

* I had great difficulty in ascertaining the office practice in this court. One of the officers within whose department it was, to have particular cognizance of it, repeatedly denied all

knowledge of its being proper to his office. Mr. Prevost, or his deputy, was very desirous of affording information, and at length obligingly communicated it to me.

CONSULTATION, &c. FORM. CONTINUANCE.

said ——— hath in our said court before our said justices at Westminster, humbly besought us to grant him our aid and assistance in this behalf; and we favourably consenting to the petition of the said ———, and being unwilling that the cognizance belonging to the said ecclesiastical court should be further delayed by false and subtle assertions, because it is in such manner proceeded in our said court before our justices at Westminster, that it is considered by the same court that the said ——— may have our writ of consultation to the court Christian aforesaid, notwithstanding our said writ of prohibition to the contrary thereof, whereof the said ——— is convicted, as it appears to us on record; we therefore being unwilling that the said ——— should be in anywise injured in this behalf, signify to you, and command that you may lawfully proceed in that cause aforesaid, and further do therein what you shall know to belong to the ecclesiastical court, our said prohibition to the contrary thereof before to you directed in anywise notwithstanding. Witness, ———, at Westminster, &c.

CONTEMPT. See title ATTACHMENT FOR CONTEMPT.

If a judge discharge a person who had been arrested out of custody under an order, on his undertaking to bring no action, and he afterwards commence one in disobedience to such order, the court will not interfere to set aside the proceedings until the order be made a rule of court. *Jameson v. Raper*, 3 J. B. Moore, 65.

Where a defendant consenting to a judge's order, obtains a benefit under it, the court will, upon the order being afterwards made a rule of court, enforce by attachment the defendant's performance of such terms of the rule as are beneficial to the plaintiff. *Hart, q. t. v. Draper*, 7 Taunt. 43, or to the crown in a *qui tam* action. *Id. ib.*

CONTINGENT DAMAGES.

What.

These are damages given where the issues upon counts to which no demurrer has been filed are tried before demurrer to one or more counts in the same declaration is decided. *Fleming v. Langton*, 1 Str. 531. See titles DEMURRER. ISSUE.

CONTINUANCE.

What.

This title imports the continuing of a cause in court by an entry upon the records there for that purpose; or, as expressed 3 Comm. 316. from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both parties be kept or continued in court from day to day till the final determination of the suit; it will be obvious therefore that this is an important head of practice.

As then the parties with their proceedings should be regularly before the court, their appearance, together with what they have respectively done in the cause from term to term, should be entered of record; in case therefore a cause be not tried the term in which the issue shall have been delivered, the entry of the continuance of the *venire* (see title VENIRE) will be agreeably to the Form subjoined, No. 1.

When it may be entered.

The continuance may be entered at any time. *Bates, q. t. v. Jenkinson*, E. 24 G. III. 1 *Tidd*, 183, 4. *Harrington v. Woolford*, 6 T. R. 617. and where it was attempted to defeat an action

of ejectment by setting up the statute of limitations, the court granted leave to enter the continuance after verdict, in order to arrive at the justice of the case. *Doe, d. Mears v. Dolman*, 7 T.R. 618. It is a necessary inference therefore that the want of a continuance will never be allowed to defeat the end of justice; and it may be added even after judgment in a penal action. *Wynne, bart. v. Middleton*, 2 Str. 1227, but then there must be something to amend by. *The King v. Ponsonby and Another*, 1 Wils. 308.

Where prevention of the operation of the statute of limitation of actions is intended, process is duly issued, and it must be regularly continued down to the period when an effectual proceeding against the defendant has taken place. See title STATUTE OF LIMITATIONS. *To save the Statute of Limitations.*

In order to save the statute of limitations the continuances must be regularly entered from term to term; so also they should be continued from one day to another in the same term (in every cause) between the commencement of the suit and the final judgment. *Martin v. Wyvill*, 1 Str. 492. *Wynne v. Wynne*, 1 Wils. 35. and if there be any lapse, or want of continuance that is not aided, the parties are out of court, and the plaintiff must begin *de novo*.

And where three *latitats* were sued out at different times for the same cause of action, and the defendant appeared upon the second and signed a *non pros* for not declaring, the court ordered the continuances subsequently entered upon the first to be struck out; being of opinion that the first *latitat* was made an end of by the second, and if it were not so the practice of the court is clear and well known, that the continuances must be by *alias* and *pluries*, and not by original writs of *latitat*. *Benson v. King*, H. 25 G. III. K. B. 1 Tidd, 183, 4.

Before declaration there is, properly speaking, no continuance, *Gilb. C. P.* 40. After declaration, and before issue joined, the proceedings are continued by imparlance; after issue joined and before verdict by *vice comes non misit breve*, [the sheriff has not sent the writ] and after verdict or demurrer by *curia advisare vult*. [the court will advise or further consider.] *id.* 618. See FORMS, Nos. 3. and 4.

The want of a continuance is aided by the appearance of the parties. *Wynne v. Wynne*, 1 Wils. 35. In this case towards the end, will be found a summary of the doctrine of continuances. Want of it how aided.

Practical Directions need not appear in this place as a distinct head; they are rather to be gathered from the different forms of entries to be made on the roll. As to practical directions.

If further continuances are necessary, they are to be added by mere repetition of the form.

In K. B. the continuances are not entered till the plea roll be made up, though the declaration be of four or five terms standing. *Curlieu v. Dudley*, 2 Ld. Raym. 872; neither is it necessary to make an entry of an imparlance or continuance on the replication, &c. though in fact delivered of a subsequent term. *Wymark's Case*, 5 Rep. 75. a. In C. P. after judgment by default, and writ of inquiry awarded, there is no subsequent continuance between the parties, but it is otherwise in K. B. 1 Rol. Abr. 486. 5.

CONTINUANCE; FORMS.

The want of continuances is aided by the statutes of jeofails, and where error is brought such want shall not be assigned for error. The court of error permits opportunity for amendment.

See titles DISCONTINUANCE, IMPARLANCE, ISSUE, JUDGMENTS.

FORMS.

No. 1.
The continuance
vicecomes non
misit breve, K. B.

(After "*the same day is given to the parties at the same place*," say) At which day, before our said lord the king at Westminster, came the parties aforesaid, by their attornies aforesaid, and the sheriff did not return the said writ, nor did he do any thing thereupon; therefore, as before, let a jury thereon come before the lord king of Westminster, on _____ next after _____ twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because, as well, &c. the same day is given to the parties aforesaid at the same place.

No. 2.
The like by original.

At which day, before our said lord the king at Westminster, come the parties aforesaid, by their attornies aforesaid, and the sheriff hath not sent the writ of our said lord the king to him in that behalf directed, nor hath he done any thing thereupon; therefore, as before, the sheriff is commanded that he cause to come before our lord the king in _____ wheresoever our said lord the king shall then be in England, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because, as well, &c. the same day is given to the parties aforesaid at the same place.

No. 3.
The continuance
curia advisare vult,
K. B.

(After joinder in demurrer, the demurrer book concludes thus): And because the court of our lord the king now here is not yet advised what judgment to give of and upon the premises, before they give their judgment thereon, day is given to the parties aforesaid, before our said lord the king at Westminster, on _____ next after _____ to hear judgment thereon, for that the said court of our said lord the king now here is not yet advised thereof, &c.

No. 4.
The same C. P.

_____ And because the justices here will advise themselves of and upon the premises before they give their judgment thereon, day is given to the parties here, until _____ to hear their judgment thereon, for that the said justices here are not yet advised thereof.

No. 5.
The like where
demurrer to part
declaration, K. B.

And as to the said first count in the said declaration above set forth, whereupon the said parties have put themselves upon the judgment of the court, because the court of our said lord the king is not yet advised of giving their judgment of and upon the premises, a day is therefore given to the said parties before our lord the king at Westminster, until _____ to hear their judgment thereupon, for that the court of our said lord the king now here is not yet advised, &c.

No. 6.

Where the sheriffs are challenged, the coroner, it is then said, *non misit breve*, instead of the sheriff as in FORM, No. 1.

No. 7.
Continuance of a
writ of inquiry by
vice comes non
misit breve.

(After the award of inquiry, say) At which day before our lord the king at Westminster came the said _____, by his attorney aforesaid, and the sheriffs did not return the said writ, nor did they do any thing thereupon. And the said _____ (*the defendant*) did not come, and upon this the said _____ (*the plaintiff*) says, that the inquisition of the said damages still remains to be made. It is therefore as

before commanded to the sheriffs of London, that by the oath, &c. (go on to award the writ of inquiry as in the judgment, which see, post).

CONTINUANCE OF NOTICE OF TRIAL.

This can only take place in London and Middlesex; and two days notice of continuance of trial, one day inclusive, the other exclusive, is sufficient, where the defendant resides within forty miles of London, and six, if that distance or beyond it. See title COUNTERMAND, &c.

Supposing notice of trial to have been given for the first sittings in term, the notice of continuance may be given for the second or for the third; or from thence for the third sitting after term, or as expressed in the case, the continuance may be before the first sitting in term to the second, or third; from thence to the sitting after term, and it can only be given once in a term. *Green v. Gifford*, 2 Str. 1110.

In C. P. a notice of trial given for the sitting after term cannot be continued to the first sitting in the next term; but in K. B. the master thinks it may. After notice is countermanded it cannot be continued. *Imp. K. B.*

EXECUTING A WRIT OF INQUIRY.

The same rules govern the continuance of notice of executing a writ of inquiry as those which govern the continuance of notice of trial, &c. except that continuance of notice of inquiry is not limited to London and Middlesex.

FORMS.

APPLICABLE TO THE TWO PREVIOUS HEADS.

[Court.] [Title cause.] No. 1.
I do hereby continue the notice of trial already given you in this cause, to the sitting after this present _____ term. Dated this _____ day of _____ 18—

Continuance of notice of trial.

Your's, &c.

To Mr. _____ plaintiff's attorney.
defendant's attorney.

[Court.] [Title Cause.] No. 2.
I hereby continue the notice of executing a writ of inquiry already given you in this cause, to the _____ day of _____ next, when the same will be executed, between the hours of _____, at _____ Dated the _____ day of _____, 18—

Continuance of notice of inquiry.

Your's, &c.

To Mr. _____ defendant's attorney, (or "the defendant in the above cause.")
_____ plaintiff's attorney.

CONTRACTS. See title PAYING MONEY INTO COURT.

CONVICTION. See title NEW TRIAL.

CONVOCAATION. CONUSANCE OR COGNIZANCE.

CONVOCAATION. MEMBERS OF CONVOCAATION. See title ARREST, *ante*, page 84.

This privilege from arrest is allowed while coming, tarrying, and returning, stat. 8 H. VI. c. 1.

CONUSANCE or COGNIZANCE.

In what sense used.

The sense in which this title is now used, refers to the claim of *conusance of pleas*.

By whom and for what granted.

This conusance of pleas is conferred by the king's grant to a city or town, whereby it is enabled to hold plea of all contracts, &c. within its liberty or franchise; and when any man is impleaded for such matters in the courts of Westminster, the mayor, &c. of such franchise may ask conusance of the plea. *Toml.*

The doctrine of conusance may more properly belong to the law upon that subject, as applicable to the place or jurisdiction where claimed.

The different descriptions of conusance.

One description of conusance can only be claimed by the lord, that is, where it is a general conusance; another description of it may be either claimed by the lord, or pleaded by the defendant; this is where the grant of the jurisdiction limits it to that peculiar court or franchise, and not elsewhere; these are also questions rather referrible to *pleading* than to *practice*; but even where an action shall have accrued within a particular jurisdiction, yet if a remedy cannot there be had, and there would in consequence be a failure of justice, a franchise shall not have conusance *Gilb. C. P.* 193; or if an action be brought against the person himself who claims the franchise, unless he hath also a power in such case of making another judge. *Hob.* 87. Year Book, *M.* 8 H. VI. 20. See a curious case put by Serjeant Rolfe on this head, 3 *Comm.* 299. n.; and it is a general rule, that wherever the defendant can plead to the jurisdiction of the court, there the lord of the franchise may claim conusance, but not *vice versa*. *Ib.*

A general rule.

When demanded.

Generally, it must be demanded before an imparlance, and the same term the writ is returnable after the defendant appears, because till he appear there is no cause in court, otherwise there would be a delay of justice; for if after imparlance, when the defendant has already a day allowed him, he would have two days, since when the conusance is allowed, the franchise prefixes a day to both parties to appear before them, and it is the lord's laches, if he does not come soon enough not to delay the parties, *ibid.* 196.

In *Rex v. Agar*, 5 *Burr.* 2820, the court entered much into the learning and practice of claiming conusance, and it was then said, that in trespass by original, where place is named, or *precipe quod reddat*, where land is demanded, conusance must be claimed on the return day of the writ, because in these cases the writ states where the cause of action arises. But in debt or detinue it is otherwise, for it is not known where the contract or obligation was made, and therefore till the plaintiff has counted, the claim needs not be made. So in replevin, the place where the cattle were taken does not appear till the plaintiff has counted, if it be between strangers; but if a replevin be sued against the lord of the franchise himself, there the lord's claim would come too late after the count, because the law intends that he knew where the taking was

made, being himself a party, and so by not demanding his privilege on the writ, he gave the court seisin of the cause; for the lord must use no delay.

The court proceeded to lay down two propositions; first, that before any person is bound to claim conusance, he is intended by law to have had some legal notice of his franchise being intrinched upon, and therefore it is said to be named conusance; secondly, that in order to bar him from making the claim, there ought to be some laches or default in him, and a time shewn when he might have claimed it sooner, after such legal notice.

Several cases shew that the claim of cognizance has been disallowed for informality in making it. *Paternoster v. Graham*, 2 *Str.* 810. *Leasingby v. Smith*, 2 *Wils.* 406. Often disallowed from informality.

What in general is requisite to be done may be collected from those cases, and from others cited in them, or in the notes subjoined thereto.

From these and other cases a summary of practical directions in relation to this infrequent head might be compiled; but for the reason above mentioned; and also from local ones, it would be consulted for the general information it might afford, rather than for any specific direction, which the practitioner himself would choose to adopt, or which will be applicable in every case; yet it will not be deemed improper to refer to the latest cases upon the subject, and which therefore will be mentioned below.

A reference to the cases already mentioned will shew that the claim, and also what has been done in the cause, must be made out and stated with great precision; that it must be put upon a roll; that the important and personal facts must be verified by affidavit; that demurrer lies to the record, and that the facts thereon stated may be controverted by pleading. What done in claiming conusance.

If the claim of conusance be allowed, a day is given on the roll for the lord to hold his court, and of course the parties are commanded to be there on that day. What if the claim be allowed.

Only a transcript of the record is allowed to go to the court below; for it may be possible that the judge may misbehave, or some other cause may arise to prevent justice being done in the inferior court, in which case the plaintiff shall have a re-summons upon the record in the superior court. *Case of the University of Cambridge*, 10 *Mod.* 125. Only a transcript of the record is to go to the court below. Where re-summons is to issue.

In the case of *Browne, D. D. v. Renouard*, clerk, 12 *East*, 12, it appears that conusance was claimed by the University of Cambridge. The several proceedings in that case appear to be Case and proceedings mentioned.

1. The latitat returnable the 15th November, served on the defendant the 11th.
2. An affidavit of residence of the defendant, sworn the 28th of the same month.
3. An affidavit of the jurisdiction and of the cause of action having arisen within it.
4. An affidavit of the matriculation of the defendant.
5. Certificates of such matriculation under the hand and seal of the vice-chancellor.
6. An affidavit verifying them.

CONUSANCE OR COGNIZANCE; FORMS.

7. The seal was also verified (by affidavit, I suppose, though not so mentioned) to be the seal of office of the V. C.

8. A deed poll, dated 28th November, to which, it was attested that, the V. C. had affixed the seal of his office, and which purported to be a claim of conusance of the above cause. The full substance of this deed poll is inserted No. 2, FORMS subjoined.

9. The affidavit, verifying the signing and sealing on the 27th November, 1809, of a power of attorney (which was entered on the roll) from the V. C. *locum tenens*, and deputy of the chancellor, masters, and scholars of the University, appointing attorney to claim and defend the privileges of the University in this action.

The roll was of M. 50 G. III. and first set out the letter of attorney, dated 27th of November; next the *latitat*; it then proceeds to set out the claim of conusance. See FORMS subjoined, No. 3.

The rule calling upon the plaintiff to shew cause why this claim of conusance should not be allowed was drawn up, "on reading the said claim of conusance, and the several affidavits, together with the letters patent, and the exemplification of the act above-mentioned."

Other than as above stated I have purposely forbore more to detail the points of the case; it affords a series of safe precedents, and the claim of conusance was, notwithstanding many objections, fully allowed.

See also *Williams v. Brickenden*, clerk, 11 *East*, 548. In this case the claim of conusance was allowed to the University of Oxford.

FORMS.

No. 1.
Entry of conusance on the roll.

(Observe what is above stated as to the necessity of all the proceedings, from their commencement down to the time of making conusance, being faithfully and accurately put upon the roll; then make the claim of conusance thus): And the said defendant, by —, his attorney, comes; and hereupon comes —, (the chancellor of the University, or lord of the franchise) by —, his attorney, to demand, claim, prosecute, and defend his liberties and privileges thereof, that is to say, to have conusance of the plea aforesaid (the whole claim is then to be entered in due form, concluding thus): And the aforesaid — (chancellor or lord of the franchise) demands his liberties and privileges aforesaid, according to the form and effect of the letters patent aforesaid, and the confirmation aforesaid, in this plea between the parties aforesaid, here in the court of the lord the king now depending, to be allowed to him; as heretofore hath been allowed. (The last words in *italic* need not be added where the franchise has been granted by act of parliament.)

No. 2.
The deed poll addressed to the lord chief justice, and the rest of the justices, K. B.

The reverend J. M. D. D. Vice-Chancellor, &c. To the right honourable sir Charles Abbott, knight, &c. greeting: Whereas by the special grace and favour of the ancestors and predecessors of our sovereign lord the now king, it is granted to the said University, and also by act of parliament confirmed and enacted, that the chancellor, masters, and scholars, and their deputies, should have conusance before themselves of all personal pleas, as well of debts, accounts, and all other contracts whatsoever, and injuries, as of trespasses against the peace, and of all misprisions within the town of Cambridge and suburbs, mayhem and felony only excepted, where any master and

scholar, or servitor, or common minister of the said University should be one of the parties: and that all and singular such like pleas and trespasses aforesaid, the chancellor and scholars, and their deputies and their successors, should hear, hold, and finally determine, wheresoever within the town and suburbs of the same town as they should think fit, and execution thereof should make according to the laws and customs aforetime used, &c.: And that the justices, &c. (*the courts at Westminster, &c.*) should allow conusance of all the aforesaid kinds of pleas, and that no justice, &c. should intermeddle concerning the said pleas, nor put the party to answer before them, but that that party before the said chancellor and his successors, or their deputies, should only be acquitted or punished in form aforesaid, and not elsewhere or otherwise, and that all and singular writs in such like pleas and trespasses made, contrary to the queen's (Elizabeth's) grant, should be by law null: And whereas an action hath lately, as is alleged, been commenced in his majesty's said court of K. B. against the reverend *G. C. R.* (*the defendant*) fellow, &c. *M. A. &c.* at the suit of *T. B.* (*the plaintiff*) *D.D.* and the said *G. C. R.* hath been served with a writ of *latitat* issued out of the said court, at the suit of the said *T. B.* and therein returnable, &c. against the form of the privilege aforesaid, we certify and signify to you that the said *G. C. R.* before and at the time of suing, summoning, and impleading aforesaid, was fellow of *S. S. College* aforesaid, and resident within the same, and registered in the book of matriculation of the said University, and still is a resident member of the University; therefore we pray you, that by virtue of the privileges to us in this behalf granted, confirmed, and enacted, as soon as you shall have inspected these our letters signifiatory and claim, you will be pleased to suspend all further process and execution thereof against the said *G. C. R.* and him from your court freely to dismiss without any expence, and that you will be pleased to remit the conusance and final decision of the said action, &c. to us, according to the form and effect of the privileges aforesaid, by virtue of which said privileges the said *G. C. R.* for a person privileged, and of the jurisdiction of the University aforesaid, and the conusance and final determination of the action aforesaid, we challenge and claim by these presents. Dated under the seal of the office of the chancellor of the University of Cambridge, the 28th day of November, in the 5th year of the reign of his majesty king George the fourth.

Signed, *J. W. V. C.* (*L. S.*)

(*After the letter of attorney, the latitat returnable on the 15th November, it proceeded*), on which day, i. e. on the 15th day of November, in this same term, before our lord the king at Westminster, comes the said *T. B.* by *E. R.* his attorney, and offers himself against the said *G. C. R.* in the plea aforesaid; and the said *G. C. R.* also comes by *W. W.* or his attorney: And thereupon also cometh into court the reverend *J. M. D. D.*, *V. C.* of the *U. of C.*, and *locum tenens* or deputy of ———, the now chancellor of the said *U.*, by *W. W. A.*, his attorney above-named, to ask and claim, prosecute and defend, all and singular the liberties and privileges of the said *V. C.* and *locum tenens*, or deputy; and thereupon the said *V. C.* and *locum tenens*, or deputy, pray his liberty, i. e. to have conusance of the plea aforesaid before the said chancellor, master, and scholars, or their *locum tenens* for the time being, to be held at Cambridge, because he says, &c.:— and so he proceeds to set out the letters patent of the 3d of *Q. E.* as stated in substance in the letter signifiatory of the *V. C.* confirmed

No. 3.

The entry of the claim of conusance on the roll. See p. 380.

CONUSANCE OR COGNIZANCE CORPORATION.

by the statute 13th *Eliz.* c. 20, and further stating as before the matriculation and residence of the defendant in the University before and at the time of the writ sued out against him, and that the causes of action, if any arose within the liberties of the University, i. e. within the town and suburbs of Cambridge, concluding with claiming consuance of the cause, as in the said letter, and proffering to the court the letters patent of Q. E., and the exemplification of the act of confirmation.

COPY OF PROCESS, or, in Practical Language, Copy of Writ.

See also title SERVICE.

In what case copy of process to be served.
Statutes.

By stat. 5 G. II. c. 27, made perpetual by stat. 21 G. II. c. 3, and extended to inferior courts by stat. 19 G. III. c. 70, in all cases where the cause of action shall not amount to 10*l.* or upwards, and the plaintiff proceed by way of process against the person, he shall not arrest, or cause to be arrested, the body of the defendant, but shall serve him personally within the jurisdiction of the court, with a copy of the process, upon which shall be written an English notice to such defendant of the intent and meaning of such service, for which no fee or reward shall be demanded or taken, provided nevertheless, that in particular franchises and jurisdictions the proper officer there shall execute such process.

Whenever the defendant is not to be arrested, he may be sued by service of such copy; where the debt does not amount to 15*l.*, he cannot, and where it does, or exceeds that sum, he need not, unless at the option of the plaintiff, be arrested.

Notice to appear to be underwritten.

Such notice to appear must also be underwritten as is subjoined to the several writs not bailable, which see, by their respective titles.

What copy in particular cases to be served.

Where defendant is sued by original, or by attachment, he must be served with a copy of the *capias*, and not of the original writ of summons or attachment. *Peter v. Regnier*, Bar. 410, and in a county palatine the defendant should be served with a copy of the process issuing out of the court at Westminster, and not with a copy of the mandate from the officer to whom it is directed. *Byers v. Whitaker*, *id.* 406.

It will be obvious that he who is to serve a copy of the process may, in case of defendant's non-appearance, be called upon to make affidavit of such service, and therefore he should be sufficiently educated, to be able to examine and compare the copy with the writ itself.

COPY OF DEEDS, INSTRUMENTS, &c.

See title OYER.

CORONER.

Wherever the sheriff, who should return the jury process, is interested, the same is directed to this officer, and if he be also interested, it is directed to elisors.

See titles DISTINGAS, ELISORS, HABEAS CORPORA, JURY, VENIRE.

CORPORATION.

What.

It is constituted of several members, whereof one is head and chief, and it is framed by fiction of law to endure in perpetual succession. Corporations are lay or ecclesiastical.

The law of corporation is extensive, but the mode in which it may sue and be sued is here to be pointed out.

A corporation must sue and be sued by its name of incorporation, and in that name it must do all other legal acts. The case of Sutton's Hospital, 10 Rep. 23; and it may sue in such name of incorporation, notwithstanding an express power given them to sue by another name. The President and College of Physicians v. Talbois, 1 Ld. Raym. 153. It must always appear by attorney, and cannot be outlawed. Case above cited from 10 Rep. Bro. Abr. 28. Co. Lit. 66 b.

How it sues and is sued.

And it may be said generally that a corporation cannot be sued in assumpsit*.

Cannot, generally be sued in assumpsit.

The proceedings against a corporation are by original writ; and not appearing by *distringas* against the common stock: if there be nothing which can be distrained, only parliament can compel appearance, 1 Ch. Ca 204. It should seem quite incompatible with any legal principle, that members of a corporation can be distrained as private persons.

A corporation is not entitled to an *essoign*. *Argent v. Dean* and Chapter of St. Paul's, cited in *Rooke v. the Earl of Leicester*, 2 T. R. 16.

Not entitled to *essoign*.

PRACTICAL DIRECTIONS, K. B. C. P.

The original writ is made out by the *curator* on a *precipe*, containing the county, plaintiff's name, style or name of incorporation, and cause of action, being left with him. As to the style of incorporation, be accurate.

Having obtained the writ, take same to the sheriff of the county; he issues a summons directed to a bailiff or officer, who usually leaves the same with the clerk, or general law agent for the corporation; and if he refuse to accept the same and undertake to appear, it may be left with the mayor, or other ostensible officer recognized for these purposes in every corporation; but in case of non-appearance, a writ of *distringas* may be issued.

The proceedings as to *distringas*, &c. appear to be thenceforth the same as against peers. See titles *DISTRINGAS*, *PRER*.

The appearance, pleadings, &c. vary not from the common form; only care must be taken that the style of the corporation be always properly mentioned.

See titles *ALLOWANCE TO PRISONER*, *INSPECTING BOOKS*.

COSINAGE OR COSENAGE, Writ of.

Kindred; Consinship.

This is called an *ancestral* writ, and it lies by the next heir after the death of his great great grandfather or grandmother, or any other collateral cousin, as the great great grandfather's brothers. *Finch's Law*, 267, and by stat. Westm. 2, c. 20, in a writ of co-

What.

* The author became alive to this position early in his pleading practice. A corporation had contracted by a parol agreement for the execution of certain works. The contractor and the corporation differed. Assumpsit was brought on the written contract. The clerk to the corporation who had prepared the

contract demurred to the declaration! I had relied too much upon forbearance to take that advantage. The contract not being under seal, the plaintiff had no remedy, and whether he were ultimately cheated or not I forget; but the fact may operate a caution to practitioners.

COSTS, *Plaintiff's general Right to Costs*; STATUTES.

senage ayel and, besayel, the point shall be inquired whether the demandant be next heir as well as in a *mort d'ancestor*.

It will be obvious, from this explanation of the nature of the writ, that it may be considered as obsolete, "not indeed wholly out of force, but certainly out of use;" having given way to the proceeding by ejectment.

COSTS.

What.

Costs, properly, are the fees and disbursements payable on the prosecution and defence of suits and actions; but in a more extended practical sense, they comprehend whatever charges become rightly incidental to business done by an attorney in a cause between party and party.

Difficulty as to what to be inserted.

It is not very easy to determine how much relative to this title ought to be found in a book of practice; it is a subject necessarily extensive, and almost wholly practical; its extent may demand compression; its being practical may forbid abridgment.

Before the publication of Mr. Tidd's most valuable work, very little upon costs was to be found in practical books.

Upon what recovery of costs depends.

Where costs are recoverable, and where they are not, depends upon the provisions of statute, and upon determinations of the courts; but it will much facilitate the due comprehension of the subject of costs to treat them in the first instance, as chiefly, if not only wholly, referable to express provisions of the legislature, and therefore I shall state briefly those statutes which continue to direct or influence the decisions of the several courts upon points involving costs.

But to state also all the several cases that have occurred on these statutes, would too much extend the title, and therefore only a very brief note of such decisions as shall tend either to elucidate or determine any doubtful applications of the statute will be here submitted.

Stat. 6 E. I. c. 1. s. 2.

First, of statutes regulating the plaintiff's costs.

The statute of Gloucester, 6 *Ed. I. c. 1. s. 2*, after giving damages to be recovered in certain cases, enacts that the demandant may recover against the tenant the costs of his writ purchased, together with his damages in the cases mentioned, and that this act shall hold place in all cases where the party is to recover damages.

Its application.

By liberal interpretation, this statute entitles the *plaintiff* to costs of the suit in assumpsit, covenant, debt on contract, case, trespass, replevin, ejectment. And where by a subsequent statute, double or treble damages are given, in a case where single damages were *before* recoverable upon stat. 8 *H. VI. c. 9*, for a forcible entry, or upon stat. 2 & 3 *W. & M. sess. 1, c. 5*, for rescuing a distress for rent, it is at length settled, that wherever single damages are recovered, there also costs shall follow. . . And it is also now settled, that the plaintiff hath a right to costs in all cases where damages are given by the statute to the party grieved.

Where it does not apply.

But where double or treble damages were given by a subsequent statute in a *new case*, where single damages were *not* recoverable, as in waste against tenant for life or years, for not setting out tithes, for driving a distress out of a hundred, where the whole or part of

a penalty is given to a common informer, for usury; in all these cases it seems the statute of Gloucester did not give costs.

Neither did this statute extend to cases where no damages were recoverable at common law, as in *scire facias*, and prohibition.

But neither plaintiff or defendant is entitled where a juror is withdrawn, to costs. 2 *Tidd*, 887.

But if the jury omit to find costs, the court may, where the plaintiff is entitled to them, make such an entry on the *postea* as is usual to authorize the allowance of costs. *Bale v. Hodgetts*, 1 *Bing.* 182.

Costs where jury omit to find them.

It appears that a general right to recover costs had its constant inconveniences; for, as on the one hand it seems to be justice, that where a plaintiff has a remedy against a wrong doer, he should also pay the costs; yet it was frequently found, as might have been foreseen, that they would much exceed the due measure of reparation; and therefore it may be presumed, that the statutes enacted subsequently to that of Gloucester, restrained or modified the general right to costs in cases even within the purview of that and other statutes whereby a right to recover them was created.

The general right to costs inconvenient.

By some of these subsequent statutes the practice of discretionary certificates to be given by the judge who tried the cause was originated. By others the plaintiff is prevented from recovering costs if, residing in particular districts, he sue in the courts at Westminster. Of such certificates some mention has been shortly made, *ante*.

Such right restrained by subsequent statutes.

The grounds and occasions of granting or withholding such certificates are created by several statutes.

By stat. 43 *Eliz.* c. 6. if upon actions personal to be brought in the courts at Westminster, not being brought for any title nor interest in lands, the judge signify or set down (*certify*) that the debt or damages do not amount to 40s. or above, the plaintiff shall have no more costs than damages.

Stat. 43 *Eliz.* c. 6.

The certificate of the judge, under this statute, deprives the plaintiff of his costs. And the certificate to deprive a plaintiff of costs may be indorsed on the *postea*, after costs have been taxed; and although the defendant's attorney was present and did not object to such taxation. *Foxall v. Banks and Another*, 5 *B. & A.* 536.

The court knows no distinction between costs generally and full costs; therefore, though the statute 11 *G. II.* c. 19. s. 9. speaks "of full costs," it does not take away the judge's power to certify under 43 *Eliz.* c. 6. that the costs [damages?] are less than 40s. *Irwin v. Reddish*, 1 *D. & R.* 413.

Where in an action for assaulting, beating, and ill treating the defendant, as to the assaulting and ill treating, justified turning the plaintiff out of his houses, but the issue on the justification was found against him: the court held, that upon the whole justification a battery appeared admitted, and the excuse not being proved, the plaintiff was entitled to full costs, without a judge's certificate. *Johnson v. Northwood*, 7 *Taunt.* 689. S. C. 1 *J. B. Moore*, 420.

GOSTS, Plaintiff's general Right to Costs restrained; CASES.

As to actions for assault, battery, and false imprisonment, and certificates therein, see *Emmett v. Lyne*, 1 N. R. 255. *Wiffin v. Kincard*, 2 N. R. 471. and title FALSE IMPRISONMENT, *Action for False Imprisonment*.

Stat. 22 & 23
C. II. c. 9. s. 136.

By stat. 22 & 23 C. II. c. 9. s. 136. for preventing trivial suits, contrary to stat. 43 *Eliz.* in all actions of trespass, assault, and battery, and other personal actions in the courts at Westminster, wherein the judge at the trial shall not certify upon the back of the record that an assault and battery was sufficiently proved, or that the freehold or the title of land was chiefly in question; if the jury find damages under 40s. the plaintiff shall not recover more costs than the damage.

Its extent.

It has been ruled that the words "personal actions" in this statute, extended no farther than to cases where the judge was permitted to certify; therefore in trover, or action of trespass *de bonis asportatis* of goods and chattels not fixed to the freehold, the plaintiff shall have his full costs, though the damages be under 40s. and though the judge do not certify pursuant to the statute. *Ven v. Phillips*, 1 *Salk.* 208. The asportation of goods and chattels, to entitle the plaintiff to full costs, will not be allowed to be made out by proving in an action of trespass to the freehold, that turf, peat, &c. were removed therefrom, this being held to be only a qualification of injury done to the land. *Clegg v. Molyneux*, 2 *Doug.* 780.

It is remarked in a note, 2 *Bac. Abr.* 38. that on the part of the defendant, minute attention should be given to the declaration, and to the evidence, and if an *asportavit* be not found, to see that the verdict be properly taken.

Its effect.

This statute, while it prevented excessive pecuniary privation for slight trespasses to the freehold, allowed, if not encouraged the committing of trespasses which, though not very injurious in point of value, might, from their frequency, become very vexatious and harassing; for unless damage to the amount of 40s. could be proved, a plaintiff risked his own costs, and therefore it is to be presumed stat. 8 & 9 *W. III.* c. 11. s. 4. enacts, "that in all actions of trespass, wherein it be certified by the judge on the back of the record that the trespass was *wilful and malicious*, the plaintiff shall recover not only his damages but his full costs of suit." In *Ford v. Parr*, 2 *Wils.* 21. it was ruled that this certificate must be made in open court at the trial. But this case has been just now declared not to be law, and with reference to the 4th sect. differently worded in this respect from the 1st sect. of the same statute, K. B. has determined, that the judge may certify out of court, and after the trial. *H. 4 G. IV.* MS. Here again a certificate entitles the plaintiff to costs.

But if the defendant plead a justification in trespass, and the plaintiff, without traversing it, new assigns a trespass not concerning his title, &c. on which issue is joined and found for him, the plaintiff is entitled to no more costs than damages, under statute 22 & 23 C. II. c. 9. s. 136. *Gregory v. Ormerod*, 4 *Taunt.* 98.

Stat. 4 & 5 *W.*
& *M.* c. 28. s. 10.

Stat. 4 & 5 *W. & M.* c. 28. s. 10. had before enacted, that if in actions of trespass against inferior tradesmen, committed while hunting, hawking, &c. they shall be found guilty, the plaintiff

should not only recover his damages thereby sustained, but also his full costs.

Upon the application of the words "inferior tradesmen" in this statute, occurred the case of *Buxton v. Mingay*, 2 *Wils.* 70. The alleged trespass being committed by the defendant while hunting, and the court divided upon the question, whether a surgeon and apothecary were an inferior tradesman or not: Mr. J. Noel, with good foresight, declaring that "he thought a surgeon the fittest person in the world to be in the field with gentlemen a hunting." This point arose by reason of small damages having been given, and it being contended that the defendant was an inferior tradesman, in order to entitle the plaintiff to full costs.

As to inferior tradesmen.

As to that part of the statute 22 & 23 C. II. c. 9. which relates to actions of assault and battery, it has been holden, that if an assault be only proved, the plaintiff shall have no more costs than damage. *Anon.* 1 *Vent.* 256. S. C. 2 *Lev.* 102. reported by the name of *Smith v. Newsam*.

Where an assault only, proved.

But where a man brings trespass for beating his servant *per quod servitium amisit*, it is not an action of assault and battery within the statute, but is an action founded upon the special damage, in which there shall be full costs. *Brown v. Gibbons*, 2 *Ld. Raym.* 831. 1 *Salk.* 207.

Where trespass brought *per quod servitium amisit*.

Neither is an action for criminal conversation with the plaintiff's wife within the statute, for the criminal conversation is the gist of the action, and not the assault. *Batchelor v. Briggs*, 2 *Bl. R.* 851.

Where brought for crim. con.

The allowing a *bonâ fide asportavit* of goods and chattels, unconnected with the freehold, to take a case out of the statute gave rise to a notion that stating on the record a distinct spoliation, tearing of clothes, &c. independently of assault and battery, would take a case out of the statute, although the judge should not certify that a battery had been proved. *Cotterill v. Tolly*, 1 *T. R.* 655. but it is now settled that if the tearing of the clothes appear to have occurred at the same time with the injury to the person, the court will consider it as part of the same transaction, and allow the plaintiff no more costs than damages, notwithstanding the declaration may not allege the former injury as consequential to the latter. *Meers v. Greenaway*, 1 *H. Bl.* 291. *Lockwood v. Stannard*, 5 *T. R.* 482.

As to tearing clothes, &c. being within the statute.

Where the defendant pleads a justification to the assault and battery, it is tantamount to a certificate of its having been proved. *Richards v. Turner*, *Bul. N. P.* 330. and it must necessarily be inferred, because a new question goes to the jury distinct from that to which a justification is pleaded; and it has been so ruled that if the defendant justify, and the plaintiff make a new assignment, to which the general issue is pleaded, he will have no more costs than damages without a certificate; neither will he if the defendant justify the assault only. *Page v. Creed*, 3 *T. R.* 391.

Justification amounts to a certificate.

Where new assignment.

The effect of the judge's certificate under this statute is to give the plaintiff costs.

Effect of the certificate under this statute.
Local acts.

By many acts of parliament, where the cause of action arises in a certain place, or where it does not exceed a certain sum, the

Welch Judicature Act.
Stat. 13 G. III.
c. 51. s. 1.

plaintiff, if he sue in the superior courts, cannot, recover costs. But it seems that payment of money into court is an acknowledgment of the jurisdiction of the superior courts. See *Miller v. Williams*, 5 *Esp.* 19.

By stat. 13 G. III. c. 51. s. 1. commonly called the Welch Judicature Act, in case the plaintiff in any personal action, &c. where the cause of action shall arise in Wales, and be tried at the assizes at the nearest English county in which the cause of action shall be laid to arise, shall not recover by verdict a debt or damages to the amount of £10; in such case if the judge who tried the cause shall certify on the back of the record of *nisi prius*, that the defendant was resident in Wales at the time of the service of the writ, or other mesne process in such action, on such fact being suggested on the record or judgment roll, a judgment of nonsuit shall be entered against the plaintiff, and such defendant shall be entitled to and have like judgment and remedy thereon to recover such and the like costs against the plaintiff in every such action, as if a verdict had been given for the defendant, unless the judge before whom such cause shall be tried shall certify on the back of the record that the freehold or title of the land mentioned in the plaintiff's (*declaration*) was chiefly in question, or that such cause was proper to be tried in such English county.

The foregoing clause limits the operation of the act to the personal actions therein enumerated.

The next clause enacts, that in all transitory actions arising within the said principality, which shall be brought in any of his majesty's courts of record out of Wales, and the debt or damages found by the jury shall not amount to the sum of £10, and it shall appear that the cause of action arose in Wales, and that the defendant was resident there at the time of the service of any writ or other mesne process served on him in such action, and it shall be so certified under the hand of the judge who tried such cause upon the back of the record of *nisi prius*, (on such facts being suggested on the record or judgment roll) a judgment of nonsuit shall be entered thereon against the plaintiff, and the plaintiff shall pay the defendant in such action his costs of suit. And in the taxation of all costs given to the defendant by this act, the proper officer shall allow to the plaintiff out of the defendant's costs the full sum given to the plaintiff by the verdict; and although no judgment shall be entered for the plaintiff upon such verdict, the same, without any judgment entered thereon, shall be a bar to any action commenced by the plaintiff for the same.

Several acts have been passed for the establishing or extending local jurisdictions over debts of a certain limited amount.

3 Jac. I. c. 15.
s. 4. the London
Court of Requests
acts.

One of the first of these local acts is stat. 3 Jac. I. c. 15. s. 4. which enacts, that if in any action of debt, or action upon the case, upon an *assumpsit* for the recovery of any debt to be sued or prosecuted against any citizen and freeman of London, or other person inhabiting there, or in the liberties thereof, being a tradesman, victualler, or labouring man, in any of the king's courts at Westminster, or elsewhere, out of the court of requests established for the same city, it shall appear to the judge or judges of the court where such action shall be sued or prosecuted, that the debt

to be recovered by the plaintiff in such action doth not amount to the sum of 40s.; and the defendant in such action shall duly prove, either by sufficient testimony, or by his own oath, to be allowed by any the judge or judges of the said court where such action shall depend, that at the time of the commencing of such action such defendant was inhabiting and resiant in the city of London, or the liberties thereof as above, that in such case the said judge or judges shall not allow to the plaintiff any costs of suit, but shall award that the same plaintiff shall pay so much ordinary costs to the defendant as such defendant shall justly prove before the said judge or judges it hath truly cost him in defence of the said suit; but by s. 6. the act is not to extend to any debt for rent upon lease of lands or tenements, or any other real contracts, nor to any other debt that shall arise by reason of any cause concerning a testament or matrimony, or any thing proper to the ecclesiastical court, albeit the same shall be under 40s.

The supposed benefits of this statute were by stat. 14 G. II. c. 10, extended to "every citizen and freeman of London, and every other person inhabiting within the said city or its liberties, and also to persons renting or keeping any shop, shed, stall, or stand, or seeking a livelihood there, who have debts owing them, not exceeding the sum of 40s. by any person or persons inhabiting or seeking a livelihood within the said city or its liberties, during their respective inhabitancy, or seeking a livelihood as aforesaid."

Extended by
stat. 14 G. II.
c. 10.

The sum of 40s. was afterwards considered as too low a limitation of the operation of these acts; and therefore by statute 39 & 40 G. III. c. 104, it was extended to "debts not exceeding 5*l.* due to any person or persons, whether residing within the city of London, or elsewhere, or to bodies politic or corporate, and fraternities or brotherhoods, whether corporate or not corporate, from any person or persons, residing or inhabiting within the said city or its liberties, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking livelihood, or trading or dealing within the same city or liberties; and if any action or suit shall be commenced in any other court than in the said court of requests for any debt not exceeding the sum of 5*l.*, and recoverable by virtue of the former acts, or of this act, in the said court of requests, the plaintiff in such action or suit shall not, by reason of a verdict or otherwise, have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant in any such action or suit, and the judge or judges before whom the same shall be tried or heard shall think fit to certify that such debt ought to have been recovered in the said court of requests, then such defendant shall have double costs, and shall have such remedy for recovering the same as any defendant may have for his costs in any cases by law."

And also by stat.
39 & 40 G. III.
c. 104.

And where the plaintiff recovers less than 5*l.* it is no objection to entering a suggestion on the roll to that effect under this act that the plaintiff believed he had a cause of action for more than that sum. *Younger v. Kilsby*, 2 *Marsh.* 145.

Several cases have occurred on the construction and application of these and subsequent acts, establishing courts of requests.

Cases on these
and subsequent
local public acts.

Cases as to the residence of the parties.

Some of these have turned upon what was, or was not, a residence or occupation of a residence, within the acts. *Miller v. Williams*, 5 *Esp. N. P.* 19. *Gould v. Colyer*, *gent. one*, &c. 1 *Smith*, 334. *Jefferies v. Watts*, 1 *New R.* 153. *Grey v. Cook*, 8 *East*, 336. *Skinner v. Davis*, 2 *Taunt.* 196. *Holden v. Newnham*, 13 *East*, 161. *Stephens v. Derry*, 16 *East*, 147. *Croft v. Pitman*, 1 *Marsh.* 269.

Cases as to the nature of the original debt.

Other cases have occurred wherein the nature of the original debt was in question. *Foot v. Coare*, 2 *B. & P.* 588. *Sandby, Clerk, v. Miller*, 5 *East*, 194.

Cases as to the person.

Others have occurred where the question was raised as to the person when plaintiffs. *Board, One, &c. v. Parker*, 7 *East*, 47. 3 *Smith*, 52. *S. C.*

Caution recommended.

Whenever the practitioner is instructed to prosecute or defend an action in the superior courts, where the debt is of small or limited amount, it will behove him to see whether it may not be properly cognizable under one of the local public acts for the establishment of courts of requests, or for the extension of the jurisdiction of county courts; some of these will now be shortly mentioned. And this caution seems peculiarly necessary to be observed where the defendant at the time of action brought, happens to be *resident* within the jurisdiction of the Birmingham court of requests act. See *Lees v. Rogers*, 4 *Taunt.* 150.

The court of requests first established or recognized by legislative authority was, as we have seen, that of London, by statute 3 *Jac. I. c. 15*. The jurisdiction of which court was by statutes 39 & 40 *G. III. c. 104*, extended to sums not exceeding 5*l*.

Other local public acts.
Southwark.
22 *G. II. c. 47*.
32 *G. II. c. 6*.
East Half Hundred of Brixton,
46 *G. III. c. 87*.

The next established in the neighbourhood of the metropolis was that of Southwark, by stat. 22 *G. II. c. 47*, to explain and amend which was passed stat. 32 *G. II. c. 6*. and by stat. 46 *G. III. c. 87*, the jurisdiction of this court, and that of the East Half Hundred of Brixton, was extended to sums not exceeding 5*l*.

And in order to proceed under the Southwark court of requests act, 22 *G. II. c. 47*, both plaintiff and defendant must be resident within the jurisdiction of the court. *Dillamore v. Casson*, 1 *Bing.* 388.

Westminster and part of the Duchy of Lancaster, 23 *G. II. c. 27*. 24 *G. II. c. 42*.
Tower Hamlets, 23 *G. II. c. 30*.
County Court of Middlesex, 23 *G. II. c. 33*.
Bath.

Then followed the establishment of that of Westminster, and part of the Duchy of Lancaster, by stat. 23 *G. II. c. 27*, to explain and amend which was passed stat. 24 *G. II. c. 42*.

After this statute, but in the same sessions, was established that of the Tower Hamlets, *viz.* stat. 23 *G. II. c. 30*.

County courts were also regulated, and their jurisdiction extended. That of Middlesex, by stat. 23 *G. II. c. 33*. The extending the jurisdiction of the court at Bath to sums not exceeding 10*l*. has been mentioned under the title *BATH, ante*. And the action for use and occupation lies therein. *Axon v. Dallimore and Another*, 3 *D. & R.* 51. And a defendant residing within the jurisdiction of this court is entitled to be sued there for a debt under 10*l*. though the cause of action accrued and the plaintiff resides out of the jurisdiction. And if such an action be brought elsewhere, the court on motion will deprive the plaintiff of costs. *Baldon v. Pitter*, 1 *Chit. R.* 635.

I do not know that any practical use would attend the enumerating all the acts establishing or recognizing these local courts. See caution, recommended, *ante*, page 390.*

Each of these acts is distinguished by some exception proper to be here noticed. That relating to rent (see *Woolley v. Clerkman*, 1 *Doug.* 244.) testament, or matrimony, and ecclesiastical matters, mentioned in the first London act, is also to be found in that of Westminster and the Tower Hamlets.

Exceptions in local acts.

And it should appear that the defendant's pleading a tender to an action for goods sold, does not preclude him from entering a suggestion on the roll to deprive the plaintiff of his costs under stat. 39 & 40 G. III. c. 104. s. 12. (London Court of Requests act.) *Jordan v. Strong*, 5 *M. & S.* 196.

May suggest for costs where tender pleaded.

An attorney must not be sued in a court of conscience for a debt under 40s. except in London, Westminster, and the Tower Hamlets. *Hussey and Another v. Jordan*, T. 25 G. III. K. B. 1 *Tidd*, 74.

Where the right to damages was doubtful, or the *quantum* uncertain, it might have been obvious, that these acts could neither in their spirit or in their letter, be applicable; yet where the plaintiff, on a special action on the case for the breach of an agreement, recovered damages under 40s. it was moved to enter a suggestion on the 14 G. II. c. 10; but the court very decisively rejected the application. *Jones v. Greening*, 5 *T. R.* 529.

To what the local statutes do not extend.

But in trover the court would not stay proceedings on an affidavit by the defendant that the cause of action did not amount to 40s. *Lowe v. Lowe*, 1 *Bing.* 270.

And where the sum recovered has been reduced under 40s. by means of set off, (that is, of cross demands, not payments on

* The propriety of their total abolition, and the re-establishment in its ancient vigour, with increased but regulated powers, adapted to the change of circumstances and things, of the county court has been suggested. A good old frame put together by our ancestors yet remains, and with very little adjustment the county court may yet be rendered adequate to every purpose of administering substantial justice in matters petty indeed, in the estimation of those who survey the affairs of men in the general, but which, on a more intimate view, will be found to occupy a large part of their real business.

Courts of Requests, as at present constituted, and also ill-irregulated local jurisdictions, facilitate improvident credits, originate numerous frauds, and even gross perjuries. Sometimes they beget much oppression, and having few determinate rules by which they hold themselves bound, they often fail in reaching the justice of the case submitted to their determination.

I was present at the trial of a cause in a remote jurisdiction, a sort of baronial court. Although the original de-

mand was said to be only 2s. 6d., the costs that day were admitted by the respective solicitors to amount to 12l. on each side. A solemn, and to some a profitable mockery of the practice in the superior courts had taken place in the previous putting off one trial, and in granting a new one. I understand that this court is now better regulated.

Since the publication of the first edition of this work, the measure, to which this note adverts, has more or less occupied the attention of parliament. At the time I am now writing (May, 1824) a bill is pending. What the issue may be I am ignorant, but of this there cannot be any doubt entertained, that both in the superior and in the inferior courts the permitting costs to operate a grievous fine upon parties seeking the recovery or the defence of their rights in respect of trifling amounts is alike disgraceful to legislation and to courts. Under an administration in some other respects not wholly disposed to cast obstacles in the way of further amendment of the law, something more may yet surely be done towards further amendment.

COSTS, Plaintiff's general Right to Costs restrained; Local Acts.

account, *Clerk v. Askew*, 8 *East*, 28. *Horn v. Hughes*, *ibid.* 347.) *McCollam v. Carr*, 1 *B. & P.* 223, (as to this case, see, however, what was said by Lord Ellenborough, C. J. in *Clerk v. Askew*, above cited; or tender, *Heaward v. Hopkins*, 2 *Doug.* 448.) these acts are held not to apply. So also where a demand for plumber's work, and new materials found, amounting in value to 8*l.* was reduced below 5*l.* by the plaintiffs taking the old lead and allowing for it, instead of using it as far as it would go, in which case the original demand would have been under 5*l.* the 12th section of the Southwark Act, as to a demand being reduced by balancing accounts, was held not to be within the exception in the 12th section of stat. 46 *G. III.* c. 87. *Porter v. Philpot*, 14 *East*, 344. So also upon an account debit and credit stated where the balance was under 5*l.* upon which account the plaintiff recovered the sum of 4*l.* 19*s.* being such balance. *Formin v. Oswell*, 1 *M. & S.* 393.

How available,

The mode of taking advantage of these statutes is by *plea*, *suggestion*, or *motion*, and if that mode be not adopted the court will not after verdict enter a suggestion on the record, that the defendant lived within the jurisdiction, or stay the proceedings. *Turton v. Chambers*, *M.* 43 *G. III.* K. B. 2 *Tidd*, 973.

Under the London Court of Conscience act the practice is to stay proceedings on paying the money without costs, and not to require a suggestion. *Robinson v. Vickers, et al.* 1 *Chit. R.* 636. n.

Whereby suggestion or not.

The defendant cannot enter a suggestion on the roll under the Middlesex Court of Conscience act, where a verdict is found for 1*s.* damages on an issue taken upon a plea in abatement of misnomer. *Welchen v. Le Pelletier*, *Ibid.*

But where the demand was cut down below 40*s.* by a defence of infancy, and the jury thereupon find damages under 40*s.* *Bateman v. Smith*, 14 *East*, 301; and also where it appears by an award that the original demand was under 40*s.* and recoverable in one of these courts, they do. *Butler v. Grubb*, *H.* 23 *G. III.* K. B. *Watson v. Gibson*, *H.* 33 *G. III.* K. B. *Harrison v. Slater*, *T.* 44 *G. III.* 2 *Tidd*, 862. See *post*, as to Costs on Arbitration. See also *Dunster v. Day*, 8 *East*, 239, as to where a defendant after judgment by default, &c. the defendant may move to stay proceedings on payment of damages assessed without costs. But the Middlesex act allows of suggestion only in cases after trial, not after inquiry. *Harris v. Lloyd*, 4 *M. & S.* 171.

They are not applicable in cases where executor is defendant. *Ailway v. Burrows*, 1 *Doug.* 263; nor in the county court in Middlesex to attornies, *Wiltshire v. Lloyd*, 1 *Doug.* 381; but see *Parker, One, &c. v. Vaughan*, 2 *B. & P.* 29. Nor are attornies, plaintiffs within the London Court of Conscience Act, 39 & 40 *G. III.* c. 104. *Board, One, &c. v. Parker*, 7 *East*, 47.

Other acts restrain the plaintiff's right to costs.

These are local acts, tending much to abridge the plaintiff's right to costs; and in the same spirit, and with the same view, plaintiffs are restrained in their right to costs in actions against revenue officers, who are particularly protected against being subjected to costs, where actions are brought for seizures which may appear on trial to have been made on probable grounds.

By stat. 28 G. III. c. 37. s. 24, in case any information or suit shall be brought to trial on account of the seizure of any goods, &c. seized, as therein mentioned, by virtue of any revenue act relating to customs or excise, or of any ship, vessel, or boat, or of any horse, cattle, or carriage, used or employed in removing or carrying the same, wherein a verdict shall be found for the claimer thereof, and it shall appear to the judge or court before whom the same shall be tried or heard, that there was a probable cause of seizure, the judge or court shall certify, that there was a probable cause for making such seizure; and in such case the claimant shall not be entitled to any costs of suit whatsoever." Several other statutes before and since the passing of that above recited have similar clauses inserted in them.

In actions against revenue officers. 28 G. III. c. 37. s. 24.

The plaintiff is also abridged of costs in actions on judgment, unless the court shall otherwise order. Stat. 43 G. III. c. 46. s. 4.; but it has been ruled that the statute does not apply to an action brought to recover the costs of a judgment of nonsuit. *Bennett v. Neale*, 14 *East*, 342. And where a defendant against whom judgment had been obtained, sued out a writ of error, and to an action on the judgment pleaded *nul tiel* record, the court allowed the plaintiff his costs or an action on the judgment. *Garnwell v. Barker*, 5 *Taunt.* 264.

In actions on judgments. 43 G. III. c. 46. s. 4.

Yet where in the account between plaintiff and defendant there are items clearly due on both sides, it is an arrest without reasonable and probable cause within the statute, if the plaintiff arrests and holds the defendant to bail for the amount due to him, without at the same time giving him credit for the items clearly due on the other side of the account. He ought only to hold the defendant to bail for the admitted balance. *Dronefield v. Archer*, 1 *Dowl. & Ry.* 67. 5 *B. & A.* 513. S.C.

The 4th section of this act, which provides, that in actions on judgments recovered, the plaintiff shall not be entitled to costs unless by the order of the court or some judge thereof, does not entitle a defendant to stay the proceedings on payment of the debt without costs, where there was probable ground for plaintiff also claiming interest on part of the debt. *Wood v. Silletto*, 1 *Chit. R.* 474.

In an action on a judgment it is irregular to sign judgment for costs without leave of the court; but on payment of costs of motion the court directed that the judgment should stand. *Armstrong v. Fuller*, *Id.* 190.

So is he in like manner abridged in an action against a justice of the peace unless it be alleged in the declaration that the act on which the cause of action arose was done maliciously, stat. 43 G. III. c. 141; nor shall the plaintiff recover costs, "where the justice shall prove at the trial that the plaintiff was guilty of the offence whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence."

Against justices of the peace. 43 G. III. c. 141.

Another general statute likewise abridges the plaintiff's right to recover costs in certain cases even where a cause of action

Where verdict is limited in amount.

For slander, stat.
21 Jac. I. c. 16.

shall be established by verdict, if that verdict be limited in its amount, as thus :

Stat. 21 Jac. I. c. 16, enacts, that in case for slanderous words to be sued or prosecuted in the courts at Westminster, or other courts that have power to hold plea thereof, if the damage is found to be under 40s. the plaintiff shall recover no more costs than damages.

Though the court
cannot award
more costs, the
jury may.

No certificate is required in this case ; but it is worthy remark, that although the power of the judges to increase the costs is in this case thus taken away, yet it is said to have been the resolution of all the justices K. B. C. P. that the jury are not bound by the statute. *Note in Brown v. Gibbons, 1 Salk. 207. and see Bale v. Hodgetts, 1 Bing. 182. cited ante, page 385.*

Does not extend
to slander of title.

It seems to have been doubtful what should be deemed slanderous words within the meaning of this statute ; but it has been holden not to extend to actions for slander of title, and the reason that was there given may have afforded a criterion for the decision of subsequent cases : for it was said, *dub.* Hyde, J. that the statute " extends to actions for slanderous words, which are intended to the persons of men, and are common actions, and rather begin of spleen than otherwise, but not to this action, which is rare, and not brought without special damage ;" and agreeably to this principle thus recognized, it is now settled, that in an action for words with special damage, and verdict for it, if the words are in themselves actionable, there shall be allowed no more costs than damages. *Burry v. Perry, 2 Ld. Raym. 1588. Collier v. Gaillard, 2 Bl. R. 1062.*

The reason.

Costs on libel.

The operation of stat. 21 Jac. I. c. 16. is confined to action for slanderous words spoken of the person, and does not extend to an action for a libel. *Hall v. Warner, T. 24 G. III. K. B. 2 Tidd, 974.*

Where justification
will not take
the case out of
the statute.

It is also said to have been ruled, that although the defendant justifies, and the plaintiff recovers less than 40s. yet that the case will not be taken out of this statute. *Bartlet v. Robins, 2 Wils. 258.*

Of double and
treble costs.

Exclusively of the statutes above mentioned, and as to which cases have been also stated in illustration or explanation, other statutes have been enacted, whereby the costs may be doubly and trebly increased ; and as to this point generally, it seems agreed, that where damages were before recoverable, and a statute increase them to double or treble the value, the plaintiff shall recover his double or treble damages ; and costs also, as parcel of the damages shall be trebled ; so agreed by the court in *Wilkinson, q. t. v. Allott, 1 Cowp. 366.*

General rule, or
maxim thereon.

Cases or statute.

In an action for a forcible entry upon stat. 8 H. VI. c. 9, which gives treble damages, the plaintiff shall not only recover treble damages, but treble costs also. *Skier and Atkinson, 1 Vent. 22.* This case was decided on the authority of *Pilford's, 10 Co.*

But before stat. 8 & 9 W. III. c. 11, it was said, that where a new statute, gave either single, double, or treble damages, where there were no damages recoverable before, no costs should be allowed. *North v. Wingate, Cro. Car. 559.*

As to single, double, and treble costs, see this title, *post.*

But by s. 3, of this statute, in all actions of waste, and actions of debt upon the statute for not setting out tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, and in all suits upon any writ or writs of *scire facias*, and suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit. 8 & 9 W. III. c. 11. s. 3.

But under this statute the plaintiff is only entitled to such costs after plea pleaded or demurrer joined. *Bale v. Hodgetts*, 1 Bing. 182. Cases therein.

Although the above clause may seem only to give the plaintiff costs on *scire facias* after plea or demurrer; yet it has been lately decided, that after judgment by default in debt on bond to secure an annuity payable quarterly, and *scire facias* thereon, suggesting a breach in non-payment of a quarter, and damages assessed to that amount on the above statute, s. 8, the plaintiff was entitled to his costs on that section, which directs a stay of proceedings on payment of future damage, costs, and charges *toties quoties*. *Brooke v. Booth*, 11 East, 387. Before this case, the practice seems to have been different.

By stat. 4 Ann. c. 16. s. 5, where the defendant has pleaded several matters, and, on demurrer joined, such matter shall be judged insufficient, costs shall be given at the discretion of the court; and in like manner, if a verdict shall be found in any issue for the plaintiff or demandant, *unless* the judge shall certify that the defendant, or tenant, or plaintiff in replevin, had a probable cause to plead such matter as was found against him. See *Thornton v. Williamson*, 18 East, 192. Where the defendant pleads several matters, stat. 4 Ann. c. 16. s. 5.

By stat. 24 G. II. c. 44. s. 7, it is enacted, that on an action brought against a justice of the peace for what he did in the execution of his office, *and* the judge shall certify that the cause of action was wilfully committed, the plaintiff shall have double costs. Where double costs recoverable against justices.

It seems that costs, as distinct from damages, were not anciently awarded, even to a plaintiff; and that in the award of damages, costs were included; where, however, a plaintiff discontinued, or failed in his suit, the defendant might suffer a very injurious expence, without remedy; and, therefore, to obviate this failure of justice to the individual, several successive statutes have been passed. The first of these is that of the stat. 52 H. III. c. 6, but applicable to the defendant in a writ of right of ward is now become obsolete; other statutes give costs to defendant in error, 9 H. VII. c. 10. 19 H. VII. c. 20, and others in replevin, 7 H. VIII. c. 4. 21 H. VIII. c. 19. See title REPLEVIN; but statute 23 H. VIII. c. 15, is more comprehensive. By this statute in any suit in a court of record or elsewhere, in any action, bill, or plaint of trespass upon stat. 5 R. II. debt or covenant upon any specialty or contract, detinue, account charging as bailiff or receiver, case, or upon any statute for any offence or wrong personal, immediately done to the plaintiff; if the plaintiff after appearance of the defendant be nonsuited, or any verdict pass by lawful trial against the plaintiff, As to costs recoverable by defendants. 23 H. VIII. c. 15.

COSTS, *Defendant's Costs against Executors, &c.*

Of executors,
plaintiffs and
defendants, lia-
bility to costs.

the defendant shall have judgment to recover his costs, to be taxed by the judge of the court, and the defendant shall have such process and execution for the same, as the plaintiff should have had in case the judgment had been for him.

Defendants in such cases cannot recover costs against executors properly suing in that character, who are nonsuit, or have a verdict against them; and see page 400, *post*; but they will not be protected in bringing wanton or improvident actions.

An executor is not liable to costs unless he has been guilty of a wilful default. *Per cur. T. 44 G. III. K. B. 2 Smith, 260. S. C. 1 Chit. R. 629. n. 2 Tidd, 923.*

Lord Mansfield, C.J. said, the privilege of executors is too great already; see *Hawes, executrix, v. Saunders, 3 Burr. 1584.* also *Higgs, administratrix, v. Warry, 6 T. R. 654.* These cases may be usefully consulted, as many of the older authorities on this point are cited in them. So where a plaintiff, executor, adds one count as executor stating a cause of action, for which he might declare in his own right, if he be nonsuited he shall be liable to costs. *Grimstead, executor of Grimstead, v. Shirley, 2 Taunt. 116;* see also *Hollis v. Smith, 10 East, 293.*

As where plaintiffs sued as executors, upon a count which alleged that the defendant, after the death of the testator, accounted with the plaintiffs as executors, concerning sums of money due from the defendant to the plaintiffs as executors, and that the defendant upon that account being found indebted to them as executors, promised them, as executors, to pay: Held, that it appeared on this count, the plaintiffs might have sued in their own right, and that therefore upon nonsuit they were liable to costs. *Jones and Another, executors of Jones v. Jones, 1 Bing. 249.*

Executors and administrators are not particularly excepted out of the stat. 23 H. VIII. c. 15, yet as that statute only relates to contracts made with, or wrongs done to the plaintiff, it has been uniformly holden that they are not liable to costs upon a nonsuit. *Smith, executor, v. Rhodes, T. 26 G. III. K. B. or verdict* where they necessarily sue in their representative character and cannot bring the action in their own right, as upon a contract entered into with the testator or intestate, or for a wrong done in his life-time. *Cook and others, executors, v. Lucas, E. 42 G. III. cited 2 East, 398. 2 Tidd, 992.*

And where the plaintiffs sued as executors for the balance of an account due to their testator, and it appeared on the trial that the balance claimed arose out of matters of account between the plaintiffs in their own right as surviving partners of the testator, and they were accordingly nonsuited: Held, that the court had no power to order the defendant to have his costs taxed, and allowed him as costs in the cause, and to become part of the judgment. *Barnard v. Higdon, 3 B. & A. 213. 1 Chit. R. 628. S. C.*

But a plaintiff suing as executor, having been appointed under a former will, which the testator had afterwards revoked, and having surreptitiously obtained a probate of the first will, which was soon afterwards annulled by the ecclesiastical court, who also revoked the probate, but not till after the action had been commenced against the defendant, who was the executor of the last will, was held

liable to the costs of the cause. *Shaw v. Mansfield*, 7 *Price*, 709.

Nor are executors or administrators necessarily exempted from costs on interlocutory motions. *Per cur. M. 42 G. III. K.B. 2 Tidd*, 993. Executors, &c.
liability to costs
continued.

But whatever is the exemption, generally, of executors and administrators when plaintiffs, from the payment of costs, they have, when defendants, no privileges respecting costs, but are liable in common with other defendants, *Plowd.* 183. *Hut.* 69, 70, and the judgment for costs is against the goods of the testator or intestate in the first instance, if the defendant hath so much in his hands to be administered, and if not, *de bonis propriis*.

It was formerly and indeed comparatively lately ruled, that though executor pleaded *plene administravit*, and it be found for him, yet where he also pleaded *non assumpsit*, and the plaintiff recovered, and of course had judgment of assets *quando acciderint*, he was held entitled to the general costs of the trial. *Hindley v. Russell*, executor, 12 *East*, 233; but now it seems that where an executrix pleaded, first, *non-assumpsit*; second, *ne unques executrix*; and third, *plene administravit*; and issues on the first pleas were found for plaintiff, and on the last for defendant, it was holden that the last plea being a complete answer to the action the defendant was entitled to the general costs of the trial. *Edward v. Bethell*, executrix, 1 *B. & A.* 254.

But where a juror is withdrawn, neither defendant or plaintiff has costs. 2 *Tidd*, 887.

Where juror
withdrawn.

By stat. 18 *Eliz. c. 5. s. 3*, perpetuated by stat. 27 *Eliz. c. 10*, if any common informer shall willingly delay his suit, or shall discontinue, or be nonsuit, or shall have the matter pass against him there by verdict or judgment in law, he shall pay the defendant his costs, charges, and damages. And a proviso is added, to save any doubt that might arise as to whether statute 24 *H. VIII. c. 8*, might not be repealed, viz. That this act, stat. 18 *Eliz. c. 5*, shall not extend to any officer, who in respect of his office has heretofore usually sued upon penal laws, nor to any officer suing only for matters concerning his office.

Where informer
liable to costs.

This act may appear remarkably severe against common informers. Mr. Tidd observes, that it seems to give costs even on arrest of judgment, but refers to *Hull. on Costs*, page 203.

In the case of *Merrick v. The Hundred of Ossulstone*, *And.* 116, and in *Doghead's case*, 2 *Leon.* 116, this statute was held not to extend to actions brought by the party grieved.

By stat. 43 *G. III. c. 46. s. 3*, in all actions to be brought in England or Ireland, wherein the defendant shall be arrested and held to special bail, and wherein the plaintiff shall not recover the amount of the sum for which the defendant in such actions shall have been so arrested and held to special bail, such defendant shall be entitled to costs of suit, to be taxed, &c. provided that it shall be made appear to the court in which such action is brought, upon motion, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for causing the defendant to be arrested and held to bail in such amount as aforesaid; and provided such court shall thereupon, by a rule or

Where defendant
arrested for more
than plaintiff re-
covers.
Stat. 43 *G. III.*
c. 46. s. 3.

order of the same court, direct that such costs shall be allowed the defendant; and the plaintiff shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only as the same shall exceed, the amount of the taxed costs of the defendant in such action; and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant to be taxed as aforesaid, that then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action from the amount of his costs so to be taxed as aforesaid, to take out execution for such costs in like manner as a defendant may now by law have execution in other cases:

Cases on this statute.

Upon this statute several practical decisions have occurred. Where, under an order for a reference at *nisi prius*, judgment was given on the award for a sum less than that for which the party was arrested, the defendant was allowed his costs. *Neale v. Porter*, T. 44 G. III. K. B. 2 *Tidd*, 998.

Difference of practice in K. B. and C. P.

The decisions K. B. and C. P. do not accord, upon the question, whether, where less than the sum sworn to is paid into court and taken out by the plaintiff, the defendant or the plaintiff is entitled to costs; K. B. ruling that the plaintiff was, *Clarke v. Fisher*, 1 *Smith*, 428. But C. P. otherwise. See *Payne v. Acton* and *Another*, 1 B. & B. 278. 3 *J. B. Moore*, 605, S. C.; where it was held, that if a defendant be arrested for 100*l.*, and the cause is afterwards referred to an arbitrator, who finds that 20*l.* only was due to the plaintiff, the defendant is not entitled to his costs, under this statute, on the ground of an arrest without probable cause.

Other cases.

And in a similar case, where the plaintiff had holden the defendant to bail, and a verdict was taken for him at the trial, subject to an order of reference for ascertaining the amount of the damages; and the arbitrator awarded a less sum than 15*l.*: upon an application to the court to allow the defendant his costs, pursuant to this statute, it was held, that in order to entitle the defendant to such costs he must shew that the arrest was vexatious and malicious. *Silver-sides v. Bousley*, 1 *J. B. Moore*, 92. See also *Rouvery v. Alefson*, 15 *East*, 90. *Laidlaw v. Cockburn*, bart. 2 *New Rep.* 76. *Butler v. Brown*, 3 *J. B. Moore*, 327. *acc.* The court of K. B. had also ruled, that a compromise of the debt at a sum less than sworn to, would not entitle the defendant to apply for costs. *Linthwaite v. Bellings*, 2 *Smith*, 667. It may, however, be remarked, that though the point, said to be decided, appear as above stated, yet the facts of this case, as reported, appear to correspond with that mentioned 1 *Smith*, 428. In the report of the case, there is not a word as to a compromise. And the practice in the court of Exchequer agrees with that in K. B. For if the plaintiff take out of court a less sum than that for which he originally proceeded, and under the amount fixed by the statute, as that for which a defendant may be held to bail, it was held not to be within the statute, if the defendant give a good reason for taking it out. *Plummer v. Savage*, 6 *Price*, 126.

And where in debt on bond the plaintiff had a verdict for nominal damages only, and took his judgment for the penalty, but re-

covers less than the sum for which the defendant was held to bail, the court did not think the defendant's claim for costs within this statute. *Cammack v. Gregory*, 10 *East*, 525. Cases on statute 43 G. III. continued.

So if a defendant be arrested for 15*l.* for goods sold, and be indebted to the plaintiff in the sum of 14*l.* only, on a promissory note payable by instalments, the court of C. P. will not allow the defendant his costs, pursuant to that statute, as he might have been arrested on the note. *Pincher v. Brown*, 3 *J. B. Moore*, 590.

Vexation seems to be the ground upon which K. B. has decided certain points arising as to costs on this statute. See the case above cited, *Rouveyro v. Alefson*, 13 *East*, 690; and the statute was also held to apply only to cases where the plaintiff recovered by verdict less than the sum sworn to. *Id.* But where two tradesmen agreed to deal with each other by way of barter; if the one refuse to state the amount, the other may arrest him for the whole value of the goods which he has furnished the party refusing to state his account; and although a sum less than that for which he shall be arrested be recovered, yet he shall not be allowed his costs under this act. *Germain v. Burrows*, 5 *Taunt.* 259.

And with reference to s. 2. of the same statute, where the defendant on being arrested paid the debt and 10*l.* for costs, (which 10*l.* was more than sufficient to cover the costs) and informed the plaintiff's attorney that he should reclaim only the surplus, which might remain after payment of debt and costs; the plaintiff's attorney, on the sheriff's omitting, after request, to remit the money, proceeded in the action, and incurred further costs, it was held, that the defendant was not liable to pay the costs so incurred after the arrest. *Clarke v. Yeates*, 3 *B. & B.* 273.

And at all events it must be a strong case against an executor to bring him within the meaning of the act. *Foulkes v. Neighbour*, 1 *Marsh. R.* 21.

But an application for costs under this act cannot be supported by a reference to the notes of the judge before whom the cause was tried. *Fountain v. Young*, 1 *Taunt.* 60; and by the same case it also appears, that an affidavit to support such an application must shew there was no reasonable or probable cause for the arrest.

Yet subsequently where a defendant was held to bail for a sum of money, claimed to be due to the plaintiff for board and lodging charged at the rate of 2*l.* 2*s.* per week. At the trial it was proved, that the plaintiff had expressly agreed to charge at the rate of 1*l.* 1*s.* per week only, and a verdict was found for a sum less than that for which the defendant was held to bail. A rule *nisi* having been obtained for allowing the defendant his costs, under the statute, the plaintiff, in answer thereto by his affidavit, denied that there was any such agreement, and swore that the whole sum claimed was justly due to him. The court acted upon the testimony given upon the trial, and made the rule absolute. *Glenville v. Hutchins*, 1 *B. & C.* 91.

By stat. 4 *Jac. I. c. 1.* if any person shall commence or sue in any court, any action, bill, or plaint of trespass, as ejectment, or other action, where the plaintiff or defendant might have costs, and after appearance of defendant becomes nonsuit, or any verdict passes by

Where defendant recovers costs in other cases.

COSTS, *Defendant's Costs on Plaintiff's Delay.*

But not against
executors, &c.

lawful trial against him, the defendant shall have judgment to recover his costs.

It should be remembered that this statute, comprehensive as are the words "if any person" does not, any more than that of stat. 23 H. VIII. c. 15, extend to executors. It will have been gathered that executors properly suing as such, are not liable to costs. But where plaintiff suing as executor, was nonsuited, upon evidence being given at the trial that the supposed testator was still alive, the court refused to allow costs to the defendant, it appearing from affidavits on both sides to be still at least doubtful whether the supposed testator were living or not. *Zachariah v. Page*, 1 B. & A. 386. And see page 396, *ante*.

Neither does it extend to where the defendant pleads in abatement, and the plaintiff enters a *nil capiat per breve*. *Pocklington v. Peck*, 1 Str. 638. but *quære*, where there is a motion to quash the writ before plea pleaded? *Huer v. Whitbread*, *Cas. Pr. C. P.* 74.

And on a joint plea of not guilty to trespass and assault, if one defendant be found guilty with 1s. damages, and 1s. costs, and the other acquitted, the latter is only entitled to 40s. costs. *Hughes v. Chitty*, 2 M. & S. 172.

Where plaintiff
delays.
Stat. 8 Eliz. c. 2.

The stat. 8 Eliz. c. 2, not extending to executors, enacts, that upon process out of K. B. if plaintiff do not declare in three days after bail put in; or if after declaration he do not prosecute his suit with effect, but willingly suffer the same to be delayed or discontinued, or be nonsuited therein, the judges by their discretions shall award the defendant costs, damages, and charges in that behalf sustained. It is on this statute that if the plaintiff enter a *nolle prosequi*, the defendant is entitled to costs. *Cooper v. Tiffin*, 3 T. R. 511.

Trespass against two defendants, one suffered judgment by default, and a writ of inquiry was executed against him. The plaintiff entered a *nolle prosequi* as to the other, who after a lapse of two years was held to be entitled to costs under this stat. *Jackson v. Lady Chambers and Ames*, 8 Taunt. 643. 2 J. B. Moore, 718.

Stat. 13 C. II.
st. 2. c. 2. s. 2.
limiting the time
for proceeding.

The act just mentioned gives the defendant costs where the plaintiff enters a *nolle prosequi* of his action, but limits no time for its due prosecution; and as actions were often commenced and abandoned to the detriment of a defendant who had appeared to them, the statute 13 C. II. c. 2. s. 3. enacts, "that upon an appearance entered for the defendant by attorney of the term wherein the process is returnable, unless the plaintiff shall put into the court from whence the process issued, his bill or declaration against the defendant in some personal action or ejectment of farm, before the end of the term next following after appearance, a nonsuit for want of a declaration may be entered against him, and the defendant shall have judgment to recover costs against the plaintiff, to be taxed and levied in like manner as upon the 23 H. VIII. c. 15." which statute is mentioned page 395, *ante*.

Stat. 8 & 9
W. III. c. 11. s. 2.
Defendant's costs
upon demurrer.

By stat. 8 & 9 W. III. c. 11. s. 2, if any person shall commence or prosecute any action in any court of record, wherein upon demurrer either by plaintiff or defendant, demandant, or tenant,

judgment shall be given against the plaintiff or demandant, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit*.

But neither demurrer to pleas in abatement nor actions wherein the defendant would not have been entitled to costs upon a nonsuit or verdict, are within the statute, yet costs were allowed in *quare impedit*, where judgment was given upon demurrer for the defendant. *Miller v. Seagrave, Cas. Pr. C. P. 25.*

What demurrers not within this statute.

By the same statute, s. 1, where several persons shall be made defendants to any action or plaint of trespass, assault, false imprisonment, or *ejectione firmæ* (ejectment) and any one or more of them shall be upon the trial thereof acquitted by verdict, every person so acquitted shall have and recover his costs of suit, unless the judge shall, immediately after the trial thereof, in open court, certify upon the record that there was a reasonable cause for making such person a defendant.

Stat. 8 & 9 W. III. c. 11. s. 1. where several defendants in trespass, &c.

This act does not extend to trespass upon the case for a tort. *Dibben v. Cook, 2 Str. 1005.* nor to trover. *Poole v. Boulton, Bar. 139.* nor to replevin. *Ingle v. Wordsworth, 3 Burr. 1284.* *Ingles v. Wordsworth, 1 Bl. R. 355.* S. C. or an information, *Rex v. Danvers, 1 Salk. 194.*

To what this stat. does not extend.

In an action in *assumpsit*, where one of two defendants had suffered judgment by default, and the other obtained a verdict, the latter it was holden was entitled to costs. *Shrubb v. Barrett, 2 H. Bl. 28.*

Nor does the statute extend to an action of debt on bond against executors, one of whom is acquitted on the plea of *plene administravit præter*. *Duke of Norfolk v. Anthony and Another, E. 42 G. III. K. B. 2 Tidd, 1001.*

And in such cases the court will permit the costs and damages on the judgment by default to be deducted from the costs taxed on the *postea* to those defendants who had a verdict. *Schoole v. Noble, 1 H. Bl. 23.*

By the same statute, s. 3, and which, though mentioned on stating the plaintiff's right to costs, will be here in part repeated, in all actions of waste debt upon the statute for not setting forth of tithes where the single value or damages found by the jury exceeds not twenty nobles, and in a *scire facias*, and suits upon prohibitions, the plaintiff shall recover his costs, and if the plaintiff be nonsuit or discontinue, or a verdict pass against him, the defendant shall recover his costs.

Where defendant is entitled to costs, same stat. s. 3.

This right to costs conferred on the defendant by these several statutes, has been restrained by statute 24 H. VIII. c. 8; which enacts, that plaintiffs suing to the use of the king in any action whatsoever, are exempted from the payment of costs where they are nonsuited, or a verdict passeth against them.

Where persons suing for the king, stat. 24 H. VIII. c. 8.

The plaintiff, we have already seen, is entitled to costs to be augmented in certain cases, doubly and trebly in their amount; so if a defendant is sued in a certain character and in certain cases.

Where defendant entitled to augmented costs.

Statute 7 Jac. I. c. 5, perpetuated by statute 21 Jac. I. c. 12. s. 2, gives double costs to justices of the peace, constables, VOL. I.

Stat. 7 Jac. I. c. 5. give double costs to justices, &c.

Other statutes.

churchwardens, overseers, &c. for any thing *done* by them in the execution of their office; see *Atkins v. Banwell*, 3 *East*, 92.

Statute 11 G. II. c. 19. ss. 21 & 22, gives the defendant costs in actions for rents and service; but as to what is not a rent within the meaning of this act, see *Leominster Canal Company v. Cowell*, 1 B. & P. 213.

But it has been ruled that parish officers or persons acting in their behalf are not entitled under the statutes 7 *Jac.* I. c. 5. 21 *Jac.* I. c. 12. to double costs upon judgment, as in case of a nonsuit in an action brought against them for the price of goods sold and delivered to them for the use of the poor. *Blanchard v. Bramble*, 3 M. & S. 131.

Statute 23 G. III. c. 70. s. 34; 24 G. III. sess. 2. c. 47. ss. 35 & 39; and 28 G. III. c. 37. s. 23, give these augmented costs to officers of the excise and customs. Statute 42 G. III. c. 85. s. 6, gives the like to persons holding public employments, and having power to commit to safe custody.

How these augmented costs to be obtained.

A defendant, in order to obtain costs under these acts, must either pursue the mode pointed out by the act where it gives any special direction, or he may apply to the court for leave to enter a suggestion on the roll concerning them. The practitioner will, therefore, refer to the particular act under which a defendant may conceive himself to be entitled to these costs; thus on statute 7 *Jac.* I. c. 5, the defendant becomes entitled to costs under the judge's certificate who tried the cause.

Treble costs on stat. 14 G. III. c. 78. (the building act.)

Under statute 14 G. III. c. 78. s. 100. (the London building act) the defendant was held entitled to recover treble costs on the nonsuit of the plaintiff, who had brought trespass against the owner of a house adjoining his own in the metropolis, for taking down his party wall *and building on it*; the defendant shewing at the trial that he was authorized to do the thing complained of under the above act. *Collins v. Poney*, 9 *East*, 322.

See further as to augmented costs, page 404, *post*.

Where the plaintiff fails on some counts, and succeeds on others.

Having thus treated of general costs upon the event of the whole suit being in favour of one party or the other, those cases may now be noticed where either party succeeding partially might conceive himself entitled to costs.

It appears that wherever a plaintiff succeeded on a trial as to any part of his demand divided into different counts in his declaration; whether the defendant have pleaded one plea to all the counts jointly, or pleaded to them separately, and separate issues have been joined, on some of which he has succeeded; yet the defendant has never been allowed costs on that part of the plaintiff's demand which has been found against the plaintiff. See *Postan v. Stanway*, executrix, 5 *East*, 265. The case of *Spicer v. Teasdale*, 2 B. & P. 49, mentioned again presently, recognizing and establishing the practice of allowing the plaintiff to recover costs upon all his counts, provided one be found for him, was in a subsequent case in effect, declared by the court of C. P. no longer to be law. Lord Eldon, C. J. in the case of *Penson v. Lee*, 2 B. & P. 330. saying "subsequent to the case of *Spicer v. Teasdale*, (cited above) the court declared that the practice of this court should in future be conformable to that of K. B." And Chambre, J. stated the practice of K. B. to be,

"that if a trial take place, and any one issue be found for the plaintiff, he must have the *general costs*; though on the taxation of those costs the officers are authorized to deduct the costs of all such parts of the pleadings, of such part of the briefs, and of such witnesses as are not applicable to the points on which the verdict proceeds." *Acc. Morgan v. Edwards and Others*, 2 *Marsh.* 201; and see 6 *Taunt.* 398. S. C.

So where the defendant pleaded first, not guilty; secondly, a justification of a right of way; and lastly, *liberum tenementum*. The plaintiff joined issue on the first, and traversed the second and last plea, and new assigned as to the second, and an arbitrator found for him generally on the first and last pleas, and also on the new assignment, with one shilling damages; and for the defendant on the second plea: Held, that the plaintiff was entitled to his full costs, deducting the defendant's costs of the issues found for him, although the witnesses of the latter were detained at the assizes by the plaintiff having withdrawn his record for the purpose of amending it. *Trotman v. Holder*, 3 *J. B. Moore*, 555. 1 *B. & B.* 222. S. C.

In trespass, where two defendants appeared by the same attorney, and pleaded, first, not guilty; and secondly, separate justifications, and A. obtained a verdict generally, and B. on his justification, but the plaintiff succeeded against B. on the plea of not guilty: Held, that B. was not entitled to any costs on the issue found for him; and that the master, in taxing A.'s costs, was right in allowing only one-half of the attorney's costs for appearance. *Holroyd v. Breare*, 4 *B. & A.* 43. 700.

In trespass for cutting down trees, plea first, not guilty; second, justifying, because the trees obstructed a highway. Replication joined issue on plea of not guilty, and denied the highway, and new assigned cutting down trees, *extra viam*; defendant joined issue on the special plea, and suffered judgment by default on the new assignment. The jury having found a verdict for the defendant on the issues on the special pleas, and assessed damages on the new assignment: it was held that the plaintiff was entitled to full costs, except upon the issues on the special pleas, and that defendant was not entitled to costs even on those issues. *Longden v. Bourn*, 1 *B. & C.* 278.

The case of *Spicer v. Teasdale*, (cited *ante*, page 402) apparently much considered, will enable the practitioner to determine how far any particular question of partial success may or may not entitle his client to such costs on the principles thus laid down as now governing the practice of both courts.

And see page 409, *post*, where other cases are specified wherein the practice as to allowance of costs in cases similar is mentioned.

Statute 4 *Ann.* c. 16. s. 4. enables defendant to plead several matters, and s. 5. provides, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or the said defendant, costs shall be also given in like manner, unless the judge who tried the said issue shall certify that the said defendant or tenant, or plaintiff in

4 *Ann.* c. 16. s. 4. & 5. gives costs on demurrer, &c.

Unless the judge certify.

Case as to demurrer to one plea, and issue as to the other.

replevin had a probable cause to plead such matter, which upon the said issue shall be found against him. Upon these clauses in this statute, the case of *Cook v. Peter Sayer*, 2 Burr. 753. was determined. In this case it appeared that there was issue as to one plea, and demurrer as to the other. The issue was tried first and found for the plaintiff, but the defendant afterwards had judgment on the demurrer; the question was, how the costs were to be taxed, and the court decided that the defendant should have the costs of his demurrer only, and that the plaintiff, by reason that the demurrer went to the whole question, should recover nothing; but neither party was taxed the costs of going to trial.

Case as to certificate under stat. 4 Ann.

If there be a certificate against any more costs than damages upon stat. 43 Eliz. c. 6. s. 2. the plaintiff shall not have the costs of the double pleas on which all the issues were found for him, although the judge have not certified under the statute 4 Ann. c. 16. s. 5. that the defendant had probable cause to plead the several special matters in that section, which says, that "if a verdict be found on any issue for the plaintiff, costs shall be given, &c." unless the judge who tried the said issues shall certify, &c. only applying to cases where one at least of the special pleas is found for the defendant, which would entitle him to the general costs. *Richmond v. Johnson*, clerk, 7 East, 583.

As to paupers to be treated separately.

As to costs to be recovered by and against a pauper; see title PAUPER. But a pauper, as such, can never pay costs. *Rice v. Brown*, 1 B. & P. 59. *Semble*, that he may receive them for the defaults of his opponent, *id. ib.* though if he misbehave the court will dispauper him and make him pay costs. *Id. ib.*

Single, double, and treble costs, what.

Only the party grieved is entitled to costs of an indictment for obstructing a highway. *The King v. Incedon*, 1 M. & S. 268.

By single are meant common costs; by double, the common costs and half the common costs; by treble, the common costs, half of these and the half of that half: or, as expressed by Mr. Tidd, who cites *Table of Costs in princip.* "If treble costs, 1. The common costs; 2. Half of these and the half of the latter."

In C. P. a motion must be made for a suggestion after nonsuit or verdict, to entitle him to double or treble costs, &c. *Prichard v. Peacock*, E. 35 G. III. K. B. 1 Tidd, 503.

Double or single costs in replevin.

Later decisions as to these may be mentioned. The statute 11 G. II. c. 9. s. 22. gives double costs to a plaintiff in replevin only in three cases, viz. where he is nonsuit, discontinues his action, or has judgment given against him; and therefore where in replevin the cause not being then at issue the parties agree by bond to submit the question to arbitration, the costs to abide the event, and the arbitrator afterwards awarded in favour of defendant, it was held he was not entitled to double costs under the statute. *Gurney v. Buller*, 1 B. & A. 670.

The avowant in replevin on a distress for poor rates is only entitled to single costs under 43 Eliz. c. 2. s. 19. *Butterton v. Furber*, 1 B. & B. 517. 4 J. B. Moore, 296.

Treble costs against sheriff.

Treble costs are recoverable by plaintiff, who recovers treble damages in action on 29 Eliz. c. 4. against sheriff, for taking more than the fee allowed by that act on levying under execution against plaintiff's goods. *Deacon v. Morris*, 1 Chit. R. 137.

Costs are part of the damages. See 1 *Chit. R.* 137. n. 139, 140, 141. n.

In an action on the 29 *Eliz. c. 4.* plaintiff is entitled to treble costs as well as treble damages. *Deacon v. Morris*, 2 *B. & A.* 303.

Where a plaintiff is put to declare in prohibition, and nonsuited at the assizes, the defendant is only entitled to his single costs under the stat. 8 & 9 *Wm. III. c. 11. s. 3*, and not to double costs under the 2 & 3 *Edw. VI. c. 13. s. 14.* *Salter v. Greenway*, T. 22 *G. III. K. B.* 2 *Tidd*, 960. Single costs in prohibition.

Further as to double and treble costs, see page 402, *ante*.

Where cause has been referred to arbitration, and costs are directed to abide the event, that means legal event; and therefore where in an action for trespass to land the arbitrator found no damages for plaintiff, and directed both parties to pay their own costs; held, that plaintiff was entitled to no costs. *Willis v. Osborne*, 1 *Chit. R.* 183. Costs on arbitration.

Award does not amount to a judge's certificate, so as to entitle plaintiff to costs where damages in trespass are under 40s. *Id.* *ib.* 185.

An arbitrator, to whom it was referred to certify what verdict should be entered up, certified for the plaintiff, and orally communicated to the parties that each should pay his own costs of the reference, which was acceded to by them. The cause having been referred back to the arbitrator, he certified in the same way a second time, but omitted to give any direction as to the costs of the second reference: held, that the plaintiff was entitled to those costs. *Mackintosh v. Blyth*, 1 *Bing.* 269.

Where a cause is referred to arbitration, and the costs are to abide the event of the award, the defendant is entitled to them if it appear by the award that the plaintiff's demand was originally under forty shillings; and he might have recovered it in a Court of Conscience. *Butler v. Grubb*, H. 23 *G. III. K. B.* *Watson v. Gibson*, H. 33 *G. III. K. B.* *Harrison v. Slater*, T. 44 *G. III. K. B.* 2 *Tidd*, 862.

Where an arbitrator authorized to tax costs in a cause has allowed an item, which it is insisted ought not to have been charged, the court will not refer the matter to the master. *Anon.* 1 *Chit. R.* 38.

Where an attorney is entitled to the costs occasioned by the taxation of his bill, he ought to apply for them at the time, and cannot recover them by motion, after making a subsequent settlement. *Whitfield v. James*, 1 *Bing.* 207. Attorney's costs on taxing.

Where a new trial is granted to the defendant on payment of costs, the plaintiff should not carry down the cause for trial until they are paid; for if he do, he will have no remedy for the costs of the former trial, even though he should again obtain a verdict. *Doe, d. Davie and Another v. Haddon*, M. 25 *G. III. K. B.* 2 *Tidd*, 921.

Where in assumpsit against two defendants one of them pleaded his bankruptcy, and the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial, and obtained a verdict against the other, who pleaded the general issue, the court held, that the former defendant was not entitled to costs. *Harewood v. Matthews and Another*, H. 56 *G. III. K. B.* 2 *Tidd*, 711. Defendant's remedy for costs.

Where costs not added to terms of rule.

Of set-off of costs.

The practice of the two courts not uniform.

Difference of practice repeated.

If a rule nisi be granted for setting aside proceedings for irregularity, without saying with costs, and this rule be afterwards made absolute, no cause being shewn, it must be made absolute in the terms in which it is moved, without adding costs. *Per Cur. H. 37 G. III. K. B. 1 Chit. R. 398. (a). 1 Tidd, 524.*

Under the head ATTORNEY, XI. *His Lien, &c. ante*, 136, will be found several decisions as to the parties right to set off cross demands of costs independently and not, of the attorney's lien, and a very particular distinction in the practice of the two courts in this respect is there mentioned. It now remains to advert to the cases where the courts have disposed of such cross demands with a view of fulfilling the essential ends of justice in behalf of the parties.

It is said that it may be considered as now established, that "parties are allowed to deduct or set off the costs, or the debt and costs, in one action against those of another; and interlocutory costs, payable to the defendant, may be set off against the debt and costs recovered by the plaintiff on the final result of the cause, notwithstanding the objection of the defendant's attorney, on the ground of his lien, which only attaches on the general balance of the costs, &c. in the cause. This practice, however agreeable to natural justice, does not seem to have obtained till lately in the Court of King's Bench."

Still it by no means seems clear from the cases cited by Mr. Tidd, that the court of K. B. would allow the costs in one action to be set off against the debt and costs in another action, as is the practice in the court of C. P., and so defeat the attorney of his lien. The case cited goes no farther than to allow interlocutory costs awarded to one party, to be set off against final costs due to another party in the same cause; and to allow the defendants in one cause to set off the costs recovered against the plaintiffs in another cause, against the plaintiff's demand for debt and costs on such defendants; for, by allowing such set off to be made in the cases cited by Mr. Tidd, it may not seem that the practice of the court of C. P. was adopted, or that the cases of Mitchell and Oldfield, and Randle and Fuller, were intended to be considered no longer conformable to the practice of K. B.; and therefore it may, I think, be concluded, that notwithstanding the case cited by Mr. Tidd from 8 *East*, the difference in the practice of the two courts still subsists; which difference in practice may be shortly stated, as it appears from the cases to be this:

The court of K. B. will, unquestionably, allow interlocutory costs, due to the defendant, to be set off against costs or debt and costs, recovered against him in the same cause, notwithstanding the attorney's lien; *Howell v. Harding, 8 East, 362*; but that court has not yet determined that it will allow the costs of one action to be set off against those of another, notwithstanding the attorney's lien; for where this was allowed as between the parties, the rule was made absolute, subject to the lien of the plaintiff's attorney; and it was referred to the master to see what was the extent of that lien; *Glaister v. Hewer, 8 T. R. 69*; whereas by the court of C. P. the attorney's lien is held to be subject to the equitable claims

that exist *between the parties*. See the cases cited title ATTORNEY, Difference of sect. xi. As to equitable claims between the parties, see *Say. Costs*, 254; *Nunez v. Mogdigliani*, 1 *H. Bl.* 217; *O'Connor v. Murphy*, *ib.* 657; though this general rule has been sometimes deemed not to apply. *Hill v. Tebb*, 1 *New R.* 311. In that case it was ruled, that if an execution be set aside with costs, the court would not permit the same to be set off against the costs of the action, but will compel the plaintiff to pay them forthwith.

On the general practice of the C. P., however, Lord Eldon, when C. J., said, "Finding it to be the practice of this court that an attorney shall not take his costs out of the fund, which by his diligence he has recovered for his client, where the opposite party is entitled to a set off; it does not become me to say more than that I find it to be the settled practice, with much surprise, since it stands in direct contradiction to the practice of every other court, as well as to the principles of justice." *Hall v. Ody*, 2 *B. & P.* 28.

The foregoing observations have been fully justified by the decision in *Middleton v. Hill*, 1 *M. & S.* 240, in which it was determined, K. B., that the lien of the plaintiff's attorney upon the debt and costs recovered in the cause, after affirmance upon the writ of error, must be satisfied before the defendants are entitled to set them off against a judgment recovered by them in another cause against the plaintiff; and costs in error are costs in the cause.

Extending what as to the right of the attorney to the fruits of the judgment, so far as the amount of his just costs is recognized K. B., it should seem that plaintiffs and defendants should by statutory regulation, or otherwise, be prevented from collusively settling an action and purposely cheating the attorney of his costs.

It appears to be decided, if it were ever doubted, that although the debt be paid, the plaintiff may proceed for the costs incurred before such payment, and this although the defendant at the time of each payment were ignorant that costs had been incurred. *Toms v. Powell*, 7 *East*, 536. But, as is hinted above, if the plaintiff choose to receive this debt, or compromise it, and give a receipt for, or otherwise give up the costs, the plaintiff's attorney cannot go on for the costs; but he must look for them to his client.

Where, although debt be paid, plaintiff may proceed for costs.

Where the plaintiff, an attorney, claimed £21 from the defendant as his moiety of the expences for preparing a lease, and five years afterwards sued him for the recovery of that sum; and the defendant, before the delivery of the declaration, took out a summons to stay proceedings on payment of £15, and the costs then incurred, which the plaintiff refused to accept, but proceeded in the action by delivering a declaration; and the defendant pleaded the general issue, and paid £15 into court, which the plaintiff afterwards took out in full satisfaction of his demand; the court refused to deprive him of the costs incurred between the obtaining the rule and taking the money out of court, there being nothing oppressive or vexatious in the plaintiff's conduct. *Carr, gent. v. Smaythies*, clerk, 6 *J. B. Moore*, 430. 3 *B. & B.* 168. *Draper v. Neill*, *Id.* 431. n. *S. P. Jones v. Johnston*, *Id.* 436. *S. P. Aspinall v. Smith*, *Id.* *S. P.*

Costs on taking money out of court.

Of costs as between the parties.

But cases occur between parties to the suit independently of the lien of the respective attorneys; some of these may be mentioned:

The party may be entitled to interlocutory costs, and the other party to the final costs in the suit. Where this happens to be the case a rule is granted on application for a stay of proceedings on acknowledging satisfaction for the less sum. *Glaister v. Haver*, 8 *T. R.* 69; and that where the less sum is due, the rule is for its being deducted, and for a stay of proceedings on payment of the balance. *Say. Costs*, 254. *Mitchell v. Oldfield*, 4 *T. R.* 124.

A. brought an action for use and occupation against B., and recovered a verdict; and B. afterwards commenced an action of trespass against A. for seizing his cattle for rent due, and A. suffered judgment by default; and, on a writ of inquiry, B. recovered £1 more in damages than A. had obtained in his action: held, that the costs of the one might be set off against the other, although it appeared that A. was insolvent, and that his attorney would be thereby deprived of his security for costs. *Lomas v. Mellor*, 5 *J. B. Moore*, 95.

A party has been allowed to set off a joint demand for costs payable to himself, and another against a separate demand for damages and costs payable by himself alone. *Cawthorne v. Thompson and Another*, *T. 24 G. III. K. B. 2 Tidd*, 1006.

In trespass, two defendants appeared by the same attorney, and pleaded, 1st, the general issue; and 2d, separate justifications. A. obtained a verdict generally, and B. obtained a verdict on his justification; but the plaintiff succeeded against him on the general issue: held, 1st, that B. was not entitled to any costs on the issue found for him; 2d, that the master in taxing A.'s costs was right in allowing only one-half of the attorney's costs for appearance, &c.; 3d, that the costs due from the plaintiff to A. could not be set off against the costs due from B. to the plaintiff. *Holroyd v. Breare and Holmes*, 4 *B. & A.* 43.

Of what is, and what is not allowed on taxation.

Where the prothonotary refused to allow costs on account of gross misconduct on the part of the plaintiff's attorney, the court refused a rule for the prothonotary to review his taxation, though the defendant had stayed proceedings under a rule for staying them, on payment of debt and costs. *Adams v. Stanton*, 1 *Bing.* 69.

A crown solicitor's bill of costs for business done in the Exchequer, under an extent, is taxable. *The King v. Partridge*, *T. 56 G. III. in Scac. 3 Price*, 280. 1 *Tidd*, 94.

Held that the master was justified in allowing the expences of two writs issued in one action against the defendant into two counties, where it was doubtful in which county the defendant was to be found. *Morris v. Hunt*, 1 *Chit. R.* 544.

Costs or not some counts.

See page 403, *ante*. In an action on the case against an agent for misfeasance, the declaration, in addition to the counts on the misfeasance, contained two counts in trover with an allegation of special damage. The plaintiff failed in substantiating the counts for misfeasance on the allegations of special damage, but recovered on the bare count in trover: held, that he was entitled only to the costs of, and occasioned by that count, divested of the special damage allegation; and that he was entitled to the sum sworn to

have been paid for the postage of foreign letters solely applicable to the cause. *Lopes v. De Tastet*, 3 B. & B. 292.

Assumpsit on a promissory note drawn by A., testator of defendant, payable to plaintiff B. Pleas, *non assumpsit*, *statute of limitations*, and *plene administravit*. The two first issues were found for the plaintiffs; the last for the defendants. The prothonotary gave the plaintiffs costs on the whole and the *postea*; to the defendants he gave the costs on the third plea only. On a motion that the prothonotary review his taxation, held that the defendant, having established an absolute bar, was entitled to the *postea* and the general costs; and that the prothonotary must review his taxation. *Ragg and Uxor., executrix, v. Wells and Uxor., executrix*, 8 Taunt. 129.

Where the costs in the cause are adjudged to the defendant, and to the plaintiff costs on the issues found for him, the costs of the issues except in replevin include only the costs of pleadings. *Othir v. Calvert*, 1 Bing. 275.

Costs of cause
and of issues.

The court confirmed the taxation of the prothonotary who had allowed the defendant general costs in the cause on the issues found for the defendant, and the plaintiff the costs of the issues found for the plaintiff. *Benett v. Coster*, 1 B. & B. 465. 4 J. B. Moore, 110.

Where the plaintiff's cause of action is altogether denied by the defendant's pleas, and at the trial the plaintiff obtains a verdict on some issues, and the defendant on others, the plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial, but not the costs of the issues found for the defendant, on which however the latter is not entitled to claim any costs from the plaintiff; but where the defendant suffers judgment by default as to some causes of action, and pleads as to others, and the plaintiff takes issue on the pleas, and at the trial all the issues are found for the defendant, the latter is entitled to the costs of the issues found for him, and the plaintiff to those only of the judgment by default. Where therefore to an action of trespass the defendant pleaded the general issue to the whole declaration, and several special pleas as to part, and the plaintiff new assigned, and the defendant suffered judgment by default as to the new assignment, and the plaintiff was bound to go to trial to get rid of the general issue, which would otherwise have barred his whole action, and he could not by any other means have obtained damages on the judgment by default: held that the plaintiff was entitled to the general costs of the causes, including those of the trial, although the jury found a verdict for the defendant on one of the special pleas, the costs of such issue being deducted, but not allowed to him on that issue. *House v. The Treasurer to the Commissioners of the Thames and Isis Navigation*, 6 J. B. Moore, 324. 3 B. & B. 117. Held, that the plaintiff may be allowed for the fees of three counsel, on taxation of costs in a cause of difficulty. *Id. ib.*

Where an attorney charged for a declaration as containing more folios than it really contained, and the charge was allowed by the master: held, that this was a ground for reviewing the taxation. *Morris v. Hunt*, 1 Chit. R. 544.

But judgment
must be first
signed.

why final judgment should not be signed for that sum ; this rule or order is made unless cause shewn, but it appears that the judgment must be signed previously to such application. *Gordon v. Corbett*, 3 *Smith R.* 179. See also *Berthen v. Street*, 8 *T. R.* 326. *Byron v. Johnson*, *Id.* 410, and the cases there cited.

See title COMPUTE.

Particulars of
demand.

In covenant, or in actions on matters of record, an order for *particulars* does not generally seem to be requisite ; still it may be presumed that circumstances might occur where the exercise of such a discretionary power, now almost grown into matter of course, would further the ends of justice ; and I believe the practice is to call for particulars of demand even in covenant.

Payment into
court.

There seems no valid objection to a specific or liquidated sum covenanted to be paid being brought into court. *Savill v. Snell*, 8 *Mod.* 305.

Venue.

In covenant or lease the venue was laid in the country where most of the witnesses resided, but it was allowed to be changed to that where the premises lay. *Hodinot v. Cox*, 8 *East*, 268.

Where plea may
be delivered.

When a plea in covenant concludes to the county, it need not be signed or filed.

Where two of three joint covenantors suffer judgment by default on counts on several deeds, and the third defends, and succeeds on some counts, the plaintiff cannot hold his judgment on those counts against the other two. *Morgan, bart. v. Edwards*, 6 *Tamst.* 398. And in such case neither party is entitled to costs on the counts on which the plaintiff fails. *Id. ib.*

Quere as to *scire*
facias on judg-
ment on running
covenant.

A very important question arises, but as to which the authorities do not seem to be agreed, namely, whether the judgment for a former breach of a perpetual or running covenant may be proceeded on by *scire facias* in case of a future breach, also without putting the party to sue another writ of covenant for such future breach. *Swann's case*, *Cro. Eliz.* 3. The reporter, however, commences the case with saying, "It was said." Recognized *arguendo*, *Howel v. Harworth*, 2 *Bla.* 844 ; but the *Anon.* case in 3 *Leon.* 51. may render this case still doubtful.

But on judgment by default, in an action of *debt* on bond for any penal sum for performance of covenant, in any deed or writings contained, damages may be assessed, as specified under stat. 8 & 9 *W. III.* c. 11. s. 8.

Lord Kenyon, C. J. and Buller, J. declared, that it was apparent that this law was made in favour of defendants, and that it was highly remedial, calculated to give plaintiff relief up to the extent of the damage sustained, and to protect defendants against the payment of further sums than were in conscience due, and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty in cases where small damages only had accrued. *Hardy v. Bern*, 5 *T. R.* 636.

See, more at length, title BREACHES, *ante*, page 282.

Of the judg-
ment and exe-
cution.

The judgment and execution in covenant is for the damages and costs.

See title DECLARATION, and *Forms subjoined*.

FORM.

[Court.]

_____ of _____ maketh oath and saith, that _____ is justly and truly indebted unto this deponent in the sum of £_____, for principal and interest due to this deponent upon and by virtue of certain articles of agreement, bearing date, (&c.) between (&c.) (*here describe shortly the instrument*) whereby the said _____ covenanted and agreed to pay to this deponent the sum of £_____, together with lawful interest for the same, at a certain day now past: And this deponent (*negative the tender.*) See title AFFIDAVIT OF DEBT, Forms.

Form of an affidavit of debt in covenant.

COVERTURE.

If an action be brought against a married woman upon a What. contract made by her before marriage, or after, she may plead the fact specially, and such plea will either abate or bar the action.

See title ABATEMENT generally, and FORMS subjoined thereto, Nos. 2 & 3.

And plea of coverture must be certain. Give the plaintiff a better writ, and have an apt and proper beginning and conclusion. *Turtle v. Lady Worseley, M. 29 G. III. K. B. 1 Tidd, 661.*

If coverture happen after plea, and before the return of the *venire*, it must be pleaded in bank. And defendant may plead that the plaintiff was covert the day of the writ purchased, though he cannot plead that the plaintiff took baron pending the writ, without pleading it after the last continuance. It is added, the diversity seems to be between such things as disprove the writ in fact, and such as disprove it in law. *Bul. N. P. 310*, where is cited *Br. Continuance, 57*. On a plea of coverture, and verdict for the defendant, the husband cannot have execution for costs without *scire facias*. *Wortley v. Rayner, 2 Doug. 637*; but it appears that the wife may have execution in her own name. *Ibid.*

Coverture of plaintiff or defendant at the time of commencing the suit is, in certain cases, assignable as error.

See title BARON and FEME.

COUNSEL.

If a rule *nisi* be discharged through mistake of counsel in not stating the terms of the affidavits on which it was founded, the counsel may be re-heard in a subsequent term. *Rex v. Middlesex (Sheriff), 1 Chit. R. 445.*

COUNTERMAND OF NOTICE.

A countermand of notice of trial, or of executing a writ of inquiry, must be given, viz. In town causes, and where the defendant resides within forty miles of London, two days are sufficient; in country causes, and where the defendant resides above forty miles from London, six days notice of countermand must be given. It must be in writing, and if the cause be a country cause, it may be delivered to the country attorney. *Imp. K. B. 68*. But *Imp. K. B. 382*, expressly states that it must be delivered to the agent in town, and not to the country attorney. See however, *Mendapace v. Humphreys, 2 Stra. 1073*, whence it appears that the countermand may be served on either the town agent or the country attorney.

COUNTERMAND, &c.; FORM. COUNTY PALATINE.

It is said by Mr. Impey, that after a notice (of trial) is countermanded, it cannot be continued.

FORM.

Countermand of notice of trial, or of inquiry.

[Court.]

[Title Cause.]

I do hereby countermand the notice of trial (or, "of executing a writ of inquiry,") given you in this cause. Dated this — day of —, 182—

Your's, &c.

—, plaintiff's attorney.

To Mr. —, the defendant's attorney, (or, to Mr. —, "the above named defendant," as the case may be).

COUNTS. See title COSTS.

COUNTY COURT.* And see title COSTS, page 384.

What is essential to the action in this court.

It is essential to the action in this court that the whole cause of action should arise, *Harwood v. Lester*, 3 B. & P. 617, and the defendant reside, *Tubb v. Woodward*, 6 T. R. 175, within the jurisdiction of the county court; otherwise, though the demand be under 40s. the action may be brought in a superior court.

Attorney's certificate under 25 G. III. c. 80. not necessary in this court.

It also appears, that to prosecute an action in the county court for more than 40s. by virtue of a writ of *Justices*, it is not necessary that the attorney should take out a certificate under the statute 25 G. III. c. 80. *Cross v. Kaye*, 6 T. R. 663.

See title JUSTICES, *Writ of Justices*.

COUNTY PALATINE.

A history of the origin of the peculiar jurisdictions of counties palatine is foreign to this work.

The counties palatine are three, viz. Chester, Durham, and Lancashire.

Writs issued into counties palatine to be specially directed. As to the mandatory part.

Writs issuing from the superior courts are to be directed to the officer proper to, or presiding in the jurisdiction.

See title DIRECTION OF WRITS.

The mandatory part, as well as the direction of the writ, also differs materially from the common form of writs directed to and to be issued in other counties. Instead of his being commanded, as is usual, to execute the same, the officer presiding in the county palatine is commanded to issue the king's writ to be directed to the sheriff of such county palatine.

Copy of *latitat*, not of the mandate, is to be served.

See FORMS subjoined; but a copy of the common writ of *latitat*, and not of the mandate, must be served in the counties palatine. *Byers v. Whitaker*, Bar. 406. See also *Chapman v. Matison*, And. 199.

Under what authority arrest is to be made.

An arrest in a county palatine is to be made by virtue of a mandate from the proper officer of such county to the sheriff of the same; but if the writ be directed to the sheriff immediately from the superior courts, he must execute it, or be liable for the contempt. *Jackson v. Hunter*, 6 T. R. 71, and in this case it was also determined that the bail-bond given therein was good.

* The bill now pending [May, 1824] may probably much modify and extend the practice herein.

If such proper officer refuse to issue the mandate to the sheriff, or to return the writ after he has made the return; or against the sheriff, if he will not return his mandate, or bring in the body of the defendant pursuant to his return of *cepi corpus*, &c. an attachment or *distringas* lies. *Chapman v. Mattison*, *Andr.* 191. S. C. 2 *Str.* 1089. See also *Grant v. Bagge and Others*, 3 *East*, 128.

It should be recollected that the arrest cannot be made for a sum under 20*l.* stat. 11 & 12 *W. III. c. 9. s. 2.* as mentioned under the head ARREST, *ante*, page 84, which statute is not repealed by the 12 *G. I. c. 29.*

See titles COSTS. ELY. ERROR. JUDGMENT. TRIAL, *Trial at Bar.* VENUE; and notice will be also taken of what properly belongs to counties palatine.

FORMS.

We command you, that by our writ under the seal of our said county palatine to be duly made, and to be directed to the sheriff of our said county palatine, you command the said sheriff that he, (&c. according to the nature and object of the writ.)

We command you, that by our writ, under the seal of your bishoprick, to be duly made and directed to the sheriff of the county of Durham, you cause the said sheriff to be commanded that he, (&c. according to the nature and object of the writ.)

George, (&c.) To our chancellor of our county palatine of Lancaster, or to his deputy there, greeting: Whereas (as in the common *latitat*; insert also *ac etiam*, see FORM, *ante*, 10, when bailable as in the common way; then, after the words "lurk and secrete themselves in your county," say palatine: Therefore we command you, that by our writ under the seal of our said county palatine to be duly made, and to be directed to the sheriff of our said county palatine, you command the said sheriff that he take the said _____ and _____, if they be found in his bailiwick, and keep them safely, so that he may have their bodies before us at Westminster, on _____ next after _____, to answer the said _____ of the plea and bill aforesaid, and have then there this writ. Witness, Sir Charles Abbott, knight, at Westminster, the _____ day of _____, in the _____ year of our reign.

Ellenborough and Markham.

(Indorse as on common *latitat*.)

County palatine of Lancaster, to wit. *Latitat* for (the parties names, &c. as in other cases.)

George, (&c.) To our chamberlain of our county palatine of Chester, or to his deputy there, greeting: (Same as in the FORM, No. 3.)

George, (&c.) to the reverend father in God, by divine providence lord bishop of Durham, or to his chancellor there, greeting: (go on as before, then after the word "palatine," proceed) Therefore we command you that by our writ under the seal of your bishoprick to be duly made and directed to the sheriff of the county of Durham, you cause the said sheriff to be commanded that he take, &c. (as above, No. 3.)

COURTS. See titles COMMON PLEAS, *Court of Common Pleas*, *ante*. COUNTY COURT, *ante*. KING'S BENCH, *Court of King's Bench*.

Where sheriff bound to obey. Against whom attachment to issue if writ disobeyed.

What sum must be sworn to before arrest in county palatine.

No. 1.
Form of writ into counties palatine of Chester and Lancaster.

No. 2.
The like into Durham.

No. 3.
Latitat into county palatine of Lancaster.

No. 4.
Precept for same.

No. 5.
Latitat into county palatine of Chester.

No. 6.
The like into county palatine of Durham.

COURT OF REQUESTS.

For decisions upon points of jurisdiction and costs, see titles ATTORNEY, COSTS, *ante*.

COURT ROLLS.

Rule for inspection, &c. how obtained.
At whose instance.

A rule for the inspecting and taking copies of court rolls, or for producing them at a trial, should the lord refuse, will be granted on motion. (See title MOTION, if necessary.) With counsel's signature, and on behalf of a copyholder, it is *absolute* in the first instance, *The King v. Shelley*, 3 *T. R.* 141; though a freehold tenant of a manor has no right to inspect the court rolls, unless there is some cause depending in which his right may be involved; and even then, it appears, that it is a rule to shew cause, *The King v. Allgood*, 7 *T. R.* 746; see, however, *Addington v. Clode*, 2 *Bla. R.* 1090. But the rule in either case, is founded on an affidavit of the being a tenant of the manor, and of demand and refusal of liberty to inspect and take copies, &c. *Roe d. Hare v. Aylmer, Barnes*, 236. *Hodges v. Atkis*, 3 *Wils.* 398.

But where a lord of a manor is indicted for a nuisance in not repairing the bank of a river, the court will not compel him to allow the prosecutor, *even though he is a tenant of the manor*, to inspect the court rolls for the purpose of obtaining evidence in support of the prosecution. *Rex v. The Earl of Cadogan*, 5 *B. & A.* 902.

See title BOOKS, *Inspection of Books*, *ante*, page 281.

CROWN, *At the Suit of the Crown*. The technical phrase by which proceeding against defendant in certain actions at the suit of the king is known.

Generally, it is matter of course, that where the crown is concerned, the court will not change the custody of a prisoner without the express consent of its officers.

By statute 25 *Edw. III. c. 19*, notwithstanding the king's protection, parties which have actions against their debtors shall be answered in the king's courts by their debtors; but execution is to be suspended till satisfaction be made to the king of his debt.

A defendant in civil custody at the suit of the crown is, by the indulgence of the court, permitted to be brought up on a *habeas corpus* to be surrendered in discharge of his bail; it should appear that the civil action in which he is bailed was commenced before the other proceedings at the suit of the crown, and also that it was for a just debt, and that the application really was made by the bail; they will then commit him as their prisoner to the custody of the marshal. *Bond v. Isaac*, 1 *Burr.* 399.

He may be remanded, however, on a *habeas corpus*, at the instance of the attorney-general. *Chitty's Case*, 1 *Wils.* 248.

CURSITOR. As to his office in making out certain writs, see *Lessee of Lawton v. Murray*, 1 *Sch. & Lef.* 75.

CUSTOM OR BYE-LAW.

Except in causes removed from London, K. B. will not allow the validity of a custom or bye-law to be objected to in a summary way on the return of the *habeas corpus*, but the parties must declare there, and the defendant may demur. *Ballard and Another, the Chamberlains of Worcester v. Bennett*, 2 *Burr.* 775.

In crown actions custody not changed.

Stat. 25 *Edw. III. c. 19*, as to the king's debtors.

Where defendant in civil custody at the suit of the crown may be surrendered by his bail.

But may be remanded.

Where cannot object to custom.

CUSTOM-HOUSE BOOKS, *Inspecting Custom-House Books*.

They are of a public nature, and may of right be inspected by persons who have an interest therein. *Dominius Rex v. The Fraternity, &c.* 2 *Str.* 1223, n. May be inspected of right.

CUSTOMS AND EXCISE.

In actions against officers of customs or excise, for any thing done by them in the execution of their duty, attention to several practical regulations is requisite.

By statute 28 G. III. c. 37. s. 25, no writ shall issue against any officer of these revenues, or against any person acting by his order in his aid, for any thing done in the execution of the revenue acts, until one month next after notice in writing shall have been delivered to him, or left at his usual place of abode by the attorney or agent for the person who intends to sue out such writ. In which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person in whose name such action is intended to be brought, and the name and place of abode of such attorney or agents, and a fee of 20s. and no more, shall be paid for the preparing and serving of every such notice. Stat. 28 G. III. c. 37. s. 25. What notice previous to writ.

An excise officer acting in the *bond fide* execution of what he supposed to be his duty, though unwarranted by his official capacity, and thus assaulting an innocent person whom he suspects to be a smuggler employed in running goods, was entitled to the notice under this act. *Daniel v. Wilson*, 1 *T. R.* 1. Where officer held entitled to the notice.

But where goods not liable to forfeiture were seized, and the officer gave them up on receiving a sum of money, it was held, that no notice of action for the recovery back was necessary. *Irving v. Wilson*, 4 *T. R.* 485. In *Wallace v. Smith*, 5 *East*, 115, Lord Ellenborough, C. J. *ibid.* 122, doubted whether such notice were necessary in *assumpsit*, and whether, in such a case, a notice be necessary or not is rendered further doubtful by *Greenway v. Hard*, 4 *T. R.* 553. Quere as to whether notice necessary in *assumpsit*.

Semble, an *extra man*, as a person acting under an excise officer, is within the act. *Clements v. Keen*, 2 *Smith*, 220. Who also entitled to notice.

The month, it will be observed, is a calendar, not a lunar month, and it begins on the day on which notice is served. *Castle v. Burdett*, 3 *T. R.* 623; and it must be recollected, that as the action must be commenced within three months next after the cause of action accrued, the notice ought to be given at least a day more than a calendar month before the expiration of three months. See title NOTICE OF ACTION. How month computed.

And the notice must contain an unequivocal statement of the intended plaintiff's abode, for where the notice was for breaking the plaintiff's dwelling-house, in C. street, in the parish of G., on a day specified, without stating that the plaintiff then dwelt at such house, it was held insufficient. *Williams v. Burgess*, 3 *Taunt.* 127. But if the parish be styled by its popular name, although it be not that by which it was consecrated, such style is enough. *Id.* What it must contain.

In actions against these officers, the venue, by stat. 28 G. III. c. 37. s. 23, and by other acts of parliament, must be laid in the county where the facts complained of were committed, and not elsewhere. Venue.

As to tender of
amends.

Where money
may be paid into
court.

Where verdict
for damages, and
the judge certi-
fies.

Where, although
judge certify,
plaintiff entitled
to damages.

As to costs.

By whom actions
for penalties to
be prosecuted.

His office and
duty.

His office and
duty.

By statute 23 G. III. c. 70. s. 33, as to excise, and statute 28 G. III. c. 37. s. 28, as to custom-house officers, as also other revenue acts, "in case the officers shall have neglected to tender any, or shall have tendered any insufficient amends before action brought, they may, by leave of the court, at any time before issue joined, pay into court such sum of money as they shall see fit; whereupon such proceedings, orders, and judgments shall be had, made, and given in, and by such court, as in other actions, where the defendant is allowed to pay money into court;" and by s. 24, in case any action, &c. shall be commenced and brought to trial against any person or persons, on account of the seizing of any goods, &c. seized as forfeited, by virtue of any act of parliament relating to his majesty's revenues of custom or excise, or of any ship, vessel, or boat, or of any horse, cattle, or carriages, used or employed in removing or carrying the same, whether any information shall be brought to trial to condemn the same or not, and a verdict shall be given against the defendant or defendants, if the court or judge, before whom such action, &c. shall be tried, shall certify that there was a probable cause for such seizure, then the plaintiff, besides the thing so seized, or the value thereof, shall not be entitled to above two-pence damages, nor to any costs.

Yet where in trespass against custom-house officers, although the judge certified that there was probable cause for the seizure, it was held, that the plaintiff was not precluded by stat. 28 G. III. c. 37. s. 24. from taking out execution for the damages found by the jury. See *Laugher v. Brelitt and Another*, 5 B. & A. 762.

As to costs recoverable by or against these officers, see title *Costs*, page 384, *ante*.

By statute 26 G. III. c. 77. s. 13, if an action be commenced or prosecuted for the recovery of any penalty or forfeiture by virtue of any act relating to the customs or excise, unless the same be commenced and prosecuted in the name of the attorney-general, or some officer of the said revenues, the same and all proceedings therein, are declared to be null and void, and the court shall not permit or suffer any proceedings to be had thereupon.

CUSTOS BREVIUM, *et recordorum*, or *rotulorum*, K. B.

An officer of the court of K. B. He has the possession of the treasury of that court, and the custody and charge of the records and writs there. He attends when required; in order to search for, and make copies and exemplifications of records; he makes up, and seals the records of *nisi prius*, except for Middlesex.

See *Table of Officers and Offices* prefixed.

CUSTOS BREVIUM, C. P.

Is said to be the principal officer in this court; he files and records all original writs, inquisitions, posteaes, and fines, with the concords. Writs of *dedimus potestatem* issued for taking the acknowledgment of such fines, with the transcript thereof, &c.; he also records and files writs of entry and summons, writs of *dedimus potestatem*, for taking warrants of attorney thereupon, and writs of seisin to support recoveries; he also makes copies and exemplifications of all these writs and records when required, and

he also returns writs of *certiorari* directed to him for the removing writs or records into K. B.

See *Table of Officers and Offices* prefixed.

DAMAGES.

The sum awarded to be paid by the defendant to the plaintiff, and specified in the record of the judgment of a court of justice. What.

Much of law; much of pleading, properly so; much of practice might be treaded under this head; but I shall endeavour to select those points which may most often occur in practice.

Damages are in general assessed either by the jury, independently of the court, or under its authority, on trial of an issue joined between the parties; but where a defendant suffers judgment to go by default, or where judgment has otherwise passed, as on demurrer, and where some damage is admitted or decided to have been sustained by the plaintiff, the assessment of the action is referred to a jury by writ of inquiry, or damages may be assessed by reference to the master or prothonotary, as in the case of bills of exchange, awards, bonds, rent in covenant, &c. Modes of assessing damages.

Where and in what cases damages may or may not be recovered is matter of law: how they are to be laid in the pleadings is matter proper to pleading.

In actions against revenue officers, if the judge shall certify a probable cause for doing the act of which complaint shall have been made by such, the plaintiff will be entitled to nominal damages only, and not to costs; see titles COSTS, page 384. CUSTOMS AND EXCISE, page 417. JUSTICES. Where only nominal damages.

Excessive damages form a ground for a new trial, but then they must appear to be excessive, or, as elsewhere expressed, "they must appear at first blush to be outrageous, and indicate passion or partiality in the jury." *Wilford v. Berkeley*, 1 *Barr.* 609. *Pleydell v. The Earl of Dorchester*, 7 *T. R.* 529. *Chambers v. Caulfield*, 6 *East*, 244. See however, *Duberly v. Gunning*, 4 *T. R.* 651. Remedy when excessive.

Where they are too small also, from the jury having mistaken the law, or from a trick, and when found by inquisition, the court will interfere. *Anon.* 2 *Salk.* 647, and the note subjoined to that case; but not where the verdict is found at *nisi prius*. *Hayward v. Newton*, 2 *Str.* 940. The reporter adds "*quare tamen*, why it is not within the reason of setting aside a verdict for excessive damage." When too small.

It may seem an anomaly in practice, but in an action of assault, battery, and mayhem, the damages were increased by the court on view of the party from 11*l.* 14*s.* to 50*l.* And see *Hoare v. Crozier*, *E.* 22 *G.* 111. K. B. 1 *Tidd*, 903. Where court may increase damages.

Where the jury on the trial of an issue have not assessed damages, an inquiry for that purpose will be awarded. *Cheyney's Case*, 10 *Co.* 118. Where jury omits to assess damages on trial.

Where damages are assessed beyond the amount laid, the plaintiff before judgment, may enter a *remittitur* of the surplus. *Boy v. Hymas*, S. P. *Chevely v. Morris*, in the Exchequer Chamber, 2 *Bl. R.* 1300; see also *Andr.* 351. Where assessed beyond amount laid.

In assumpsit upon a charter-party, damages may be recovered beyond the penalty. *Harrison v. Wright*, 13 *East*, 343.

Damages in *scire facias*.

Where assessed generally on declaration containing good and bad counts.

Liquidated damages, what shall be.

Where treble damages found.

Damages in penal actions how to be assessed.

Decision contra.

Where plaintiff shall be barred.

A judgment may be reversed as to damages in *scire facias* only. *Henriques v. The Dutch West India Company*, 2 Str. 807. 2 Ld. Raym. 1532. S. C.

Where there were more counts than one, and general or entire damages assessed; if any one or more counts be bad or inconsistent, the judgment will be arrested, 2 Saund. 171. b. d.; but where a general verdict has been given on two counts, one of which is bad, and it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good count only, the court will amend the verdict by entering it on that count, though evidence were given applicable to the bad count also. *Williams v. Breedon*, 1 B. & P. 329; but it is said, that if there were any evidence which applied to the bad or inconsistent counts, the *postea* cannot be amended, and that in such a case the only remedy is, by awarding a *venire de novo*. See 2 Saund. 171. b. d.

This seeming contrariety may be reconciled, by supposing that no means existed by which the *postea* might be amended. In the case cited, 1 B. & P. 329, the verdict was amended from the judge's notes, although evidence was also given applicable to the bad count; but if there be only one count, and that consists of words actionable and not actionable, and evidence applicable to both sets of words be given, and damages be found thereon, the judgment shall not be arrested. *Lloyd v. Morris, Willes*, 443.

Where the defendant agreed to do and accept or take many things, and the plaintiff also agreed to do on his part certain acts, and either party not fulfilling all and every part was to pay to the other 500*l.* thereby settled and fixed as liquidated damages, it was held, that on breach of the agreement by omission to take an assignment as specified in the agreement, the defendant was liable to pay the whole 500*l.* and that it was not a mere penalty to cover such damages as might be actually incurred. *Reiley v. Jones*, 1 Bing. 302.

Where a statute gives treble damages, the plaintiff is entitled to treble the sum found by the jury, and treble costs, and the damages are not to be calculated in the manner treble costs usually are. *Sed nota*, that in that case the damages were so calculated and allowed. 1 Chit. R. 137. 141 (a).

In a penal action the damages should be assessed on the proper count, for it appears by a late determination, that if the jury find a verdict for the plaintiff with one penalty generally, and the plaintiff apply it to one count, he cannot afterwards apply it to another. *Holloway, q. t. v. Bennett*, 3 T. R. 448. In *Salston v. Norton*, 3 Burr. 1235, indeed, *semble* a contrary doctrine; but no allusion to this case appears in the decision, 3 T. R. above cited.

Where the cause of action against many defendants is integral, a verdict obtained by one will defeat the plaintiff's remedy against any; or, agreeably to the following case, where it was said, that if *assumpsit* is brought against two, and one lets judgment go by default, and the other pleads to issue, and has a verdict upon the merits, the plaintiff shall be barred as to (obtaining damages against) the other. *Per Buller, J. Anon.* 1 Str. 610, n.

So, it may be gathered from the cases cited, that in trespass, &c. and judgment by default against one defendant, but the plaintiff fail against the other on the general merits, he fails against both.

Briggs v. Greenfield, 1 *Str.* 610; but if the plaintiff only fail by reason of some plea operating in discharge of the particular defendant, the judgment obtained against the defaulters is good. *Jones v. Harris*, 2 *Str.* 1108; and it seems by latter decisions that the jury cannot assess different degrees of damages against different defendants, all found guilty of the trespass; but the damages must be whole, though against some of many. *Mitchell v. Milbank*, 6 *T. R.* 199. A different practice once prevailed, *Lane v. Santeloe*, 1 *Str.* 79, *contra*, who join in pleading; but the jury may acquit some, and find others guilty, and assess damages against the guilty, *Sir John Heydon's Case*, 11 *Co.* 5; and it may be remarked that though in *assumpsit* he may, yet in tort, if such damages be levied on one of the defendants only, he cannot recover against the others. *Merryweather v. Nixam*, 8 *T. R.* 186.*

Where different degrees of damages cannot be assessed.

The jury may give damages in trespass, although it be alleged to have been committed under a false charge; the objection taken was, that matters of trespass and of slander were mixed, and that the damages seemed to have been given rather for the slander than the trespass; but the court said the trespass was the substantive charge and not the slander, which was only matter of aggravation. See *Bracegirdle v. Orford*, 2 *M. & S.* 77.

Where damages may be remitted by the plaintiffs, each case must depend upon its own circumstances; but as a general rule it appears that where some defendants have pleaded, and others have suffered judgment by default, and different damages shall have been found by the juries on the trial, and on the writ of inquiry against each, the plaintiff shall be at liberty to remit the lesser, and take judgment against all the defendants for the greater damages: but taking damages for the whole several damages would make the judgment bad in point of law. *Sabin v. Long*, 1 *Wils.* 30. See also 1 *Saund.* 285. notes 5 & 6.; 286. n. 10.

Where damages remitted.

Where damages are omitted to be found by the principal jury, the omission may be supplied in some cases by a writ of inquiry. See title *INQUIRY, Writ of Inquiry*.

Judgment vitiated by taking whole several damages. Where damages omitted to be found.

As to damages assessed, where one party has pleaded to issue, and the other has demurred; see title *CONTINGENT DAMAGES*.

Upon a contract to replace stock and pay dividends in the mean time, though the jury give damages for the value of the stock and

What may measure the increase of damages.

* How far the practice adopted in the case of *Lane v. Santeloe* may be more or less objectionable than the later and present practice, cannot be properly here discussed; but it may seem that a recompense for a civil injury should be derived from the really offending party. Of six defendants in an action of trespass, five may be made defendants, and such is the practice to prevent their being witnesses for each other, or for such party; or they may have very little indeed contributed, or each in a degree more or less, to effect the injury. By all being made defendants they are deprived of the evidence of one another, as to their little comparative guilt; yet as the

practice now is, the whole measure of recompense to the party injured may be derived at the hand of the least guilty of the six, while from the inability of the person upon whom the damages shall be levied to recover any proportion of them against his co-defendants, the real instigator of the mischief may wholly escape all legal responsibility.

According to *Wahb v. Bishop, Cro. Car.* 239, if the defendants sever in pleading, and both issues be found for the plaintiff, he may enter a *nolle prosequi* as to one, and levy on the other; this is also giving the plaintiff power to punish the least for the injury committed by the most guilty.

When costs included in damages.

Where costs may be recovered with, or as a part of damages.

Where damages and costs tendered after action commenced.

the amount of the dividends, yet upon affirmance in error of the judgment, the measure of the increase is not the further dividends that may have accrued, but interest on the damages given as the value of the capital stock. *Dwyer v. Gurry*, 7 Taunt. 14.

In case against the sheriff, where, in stating the substance of a writ of *fiari facias*, the count alleged that the sheriff was commanded to levy 80s. awarded to J. C. for his damages sustained by occasion of the detaining the debt; that fact is proved by producing the writ which stated that the 80s. were awarded to J. C. for his damages sustained as well by reason of detaining the debt, as for his costs, &c. for costs are in legal sense included in the word "damages." *Phillips v. Bacon*, 9 East, 198.

If the buyer of a horse with warranty, and being sued thereon by his vendee, offer the defence to his vendor, who gives no directions as to the action, the plaintiff defending that action is entitled to recover the costs thereof from his vendor, as part of the damages occasioned by his breach of warranty. *Lewis v. Peake*, 7 Taunt. 153.

Where damages and costs were tendered after action commenced, they may on motion be paid into court before plea pleaded; and the plaintiff, if he accept the same, shall pay all costs from the time of the tender; if the plaintiff refuse to accept the same, the sum tendered will be struck out of the declaration. *Roberts v. Lambert*, 2 Taunt. 283. See *Zeeven v. Cowell*, *ib.* 203, where it was also ruled, that if after action commenced and before declaration, the defendant offer to pay the debt and costs, and the plaintiff refuse to receive them, the court will permit the defendant to pay into court the debt and the costs up to the time of his offer only, and the plaintiff will be compelled to pay the costs of the application, and all costs in the action subsequent to the offer. See *contra*, *Barmester v. Hilch*, 13 East, 551. And, indeed, however reprehensible such practice may be, the courts do not appear to be disposed virtually to dispense with the necessity of tender, or payment of money into court before action, which they would do should they give full effect to the case. 2 Taunt. 203. cited above. But if a plaintiff, for the sake of costs, deliver a declaration, and afterwards accept from the defendant a sum which was offered to him before declaration, he shall have costs only up to the time of the plaintiff's first offer. *Sawbridge v. Coxwell*, 4 Taunt. 255.

See titles EJECTMENT. RULE TO COMPUTE. VERDICT. WARRANTY.

As to damages further, see the particular title under which the question may occur.

DARREIN PRESENTMENT.

What.

This writ issues at the instance of the heir to the patron, directed to the sheriff to inquire by an assize or jury who made the last presentment to a benefice, to which a stranger has presented; and that assize is by stat. *Westminster 2*, provided it be found against him, enabled to give damages against the stranger.

The remedial benefit of this writ being confined to the patron and his heirs, has given way to that of *quare impedit*. See, therefore, title QUARE IMPEDIT.

DATE. Indorsement of date of process. See title **PROCESS**.

DAY IN BANK. A phrase in practice, signifying the day when writs shall be returned, or when the party shall appear upon the writ served. What, in practice.

In pleading, the day of *nisi prius*, and the day in bank, are one day; and after issue found for the plaintiff at the *nisi prius*, if a day be given in bank, and the defendant make default, judgment shall be given against him, 2 *Danv. Ab.* 477. Day in banc, or *dies in banco*, seems properly to be applicable to the stated return days in the court of Common Bench. See 3 *Comm.* 277. In pleading.

DAY-RULE or DAY-WRIT.

A rule or order of the court by which a prisoner on civil process, and not committed, is enabled, in term time, to go out of the prison, and its rules, or bounds; and it covers when made, by relation back, the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the court on the same day, though the marshal were sued for the escape before the sitting of the court. *Field v. Jones*, 9 *East*, 151. What,

Three descriptions of rules, by which a prisoner is enabled to quit, for more or less time, the prison, are obtainable: 1. The day rule; 2. The term rule. See title **TERM RULE**. 3. The rules. See title **RULES**.

PRACTICAL DIRECTIONS.

The day rule is obtained on petition to the court, signed by the prisoner, praying that day-rules may be allowed him for the purposes expressed therein. *R. G. H. T.* 45 G. III. removes the restrictions that were imposed on the granting day-rules by former rules *K. B.*; but it is to be fully understood that the prisoner is to return into proper custody before nine in the evening of every day in *K. B.*; before eleven, *C. P.*

To obtain a day-rule the prisoner applies to the clerk of the papers at the prison; the names of sureties are given him, and they, together with the prisoner, execute a bond to the marshal of *K. B.* or to the warden of *C. P.* as in the case of giving these officers security, on application for leave to reside within the rules of the prison; pay for the bond, *C. P.* if under £500, 47s. 6d. including the duty; if the debt exceed £500, an additional charge is made. I believe in *K. B.* the charge is somewhat more; each rule is 4s. 6d. except those for the first and last days of term, which are 5s. each.

If the applicant already reside within the rules, but is desirous of leaving them for a day or more in term, new or other security than that already given, on a grant of the rules, is, I believe, required.

FORMS.

To the right honourable sir Charles Abbott, knight, and the rest of the judges of his majesty's court of King's Bench, Westminster.

The humble petition of ——— (if many require the day-rule, say "several prisoners,") in actual custody of the marshal of this court, whose name (names) is (are) hereunto subscribed, sheweth that your said petitioner (petitioners) having this day occasion, to,

No. I. . . .
The form of the petition to the court for the day-rule.

DAY-RULE, &c. FORMS. DEBT, *Action of Debt.*

treat with his (*their*) several creditors, advise with his (*their*) counsel, and follow his (*their*) several suits at law, in order to his (*their*) discharge, humbly prays (*pray*) that he (*they*) may have leave to go out of the prison this day for the purposes aforesaid, and to return again the same day.

And your petitioner (*petitioners*) shall ever pray, &c.
(Signed) _____

No. 2.
The day-rule.

(*The day of the term when rule applied for.*)

England. Upon reading the petition of _____ (*and others*) prisoner (*prisoners*) in the custody of the marshal of the Marshalsea of this court, this day presented to this court, thereby praying that the said _____ might have leave to go out of the said prison for the purposes in the said petition set forth, IT IS ORDERED that the said _____ have leave to go out of the said prison, he returning again into the custody of the said marshal on this day.

By the court.

DEATH. Where one of several plaintiffs or defendants dies after issuing of the writ, and before declaration, the commencement should suggest such death, stat. 8 & 9 *W. III. c. 11. s. 7.* *Farr v. Dunn*, 1 *Burr.* 368.

See titles *ABATEMENT of the Suit by Death*, &c. ante, page 5.
DEMISE, Demise of the King. **JUDGMENT. WARRANT OF ATTORNEY, post**, &c. &c.

DE BENE ESSE. A technical phrase applied to certain proceedings, which are deemed to be well done for the present, or until an exception or other voidance; thus the meaning appears to be "conditionally," and in that meaning is the phrase usually accepted. Thus a declaration is filed or delivered, special bail put in, witnesses examined, &c. *de bene esse*, or conditionally; good for the present. See title *DECLARATION*.

DEBT, *Action of Debt.*

Where debt lies generally.

Lies where a sum of money is ascertained by agreement, as by bond for the payment of money by a bill or note; see however exception as to acceptor, *post*; by a special bargain; or where rent is reserved on a lease; where the quantum is fixed and specific, and does not depend on any subsequent valuation to settle it: or on award, where money is only awarded; but the whole money must be due at the time of bringing the action; and where the award is for money only, it seems better to declare on that, than on the bond, in order to avoid the delay and expence of suggesting breaches under the statute of *W. III.* which is necessary when the action is on the bond, if the defendant suffer judgment by default. *Welch v. Ireland*, 6 *East*, 613.

Lies against a sheriff for an escape.

It is well brought against sheriffs for an escape, because the sum to be recovered from the sheriff is measured by that for which the party was charged in custody. This remedy is given by statute, and lies only where the escape is after execution. If the escape be before, the remedy is case, 2 *Inst.* 282, and it is material to observe, that in this action against the sheriff the statute of limitations does not apply, 2 *Saund.* 67. n. 10, which cites 1 *Saund.* 37 & 38. n. 2. *Jones v. Pope*.

It lies on records as on judgment in foreign or other courts, recognizances, &c. and on penal statutes, at the instance of the party grieved, or by common informers. In all these cases the sum to be recovered is specified. Where it otherwise lies.

It is also a rule that whenever *indebitatus assumpsit* will lie, debt will also lie.

The proceedings in an action of debt are summary: it is true that there is no interlocutory judgment as in *assumpsit*, and bail must also in some cases, such as for rent, or on a money bond, or on a written contract for a sum certain, be given in error, though the judgment be on *nil dicet*, or on demurrer. *Tries v. Bridgman*, 2 *East*, 359. It might seem, therefore, that whenever the demand is liquidated, this form of action may be advantageously adopted. The proceedings in debt.

But where the damages remain to be ascertained, as where they are contingent, as in the case of indemnity; or where debt is brought on bond for the performance of covenants, breaches must be assigned under stat. 8 & 9 *W. III. c. 11*. See title *BREACHES*.

And where debt is brought on a judgment, for a sum of a certain limited amount, the party should be aware that by the provisions of the local acts, mentioned under title *COSTS*, he will be allowed to recover no more costs than damages. *Foott v. Coare*, 2 *B. & P.* 558. And as to costs in actions on judgments, see title *COSTS*, page 384, *ante*. Where brought on a judgment.

In *Coore v. Kenedy*, 3 *Esp. Ca. Ni. Pri.* in an action in K. B. on a judgment in the London Court of Conscience, it was held necessary to prove that at the time the judgment was obtained, the defendant was resident within its jurisdiction.

Formerly, great objection justly lay to the action of debt being adopted unless of necessity, and in specific cases; first, by reason that in this action, where not on specialty, the defendant may, even at this day, except in the Exchequer, wage his law, or where the creditor is become so by legal necessity against a gaoler; secondly, it was the practice to consider that only the precise sum demanded was recoverable; the plaintiff being therefore so strictly held, was the less desirous of aiming at the advantages proposed by this form of action; but this last reason is no longer in force, for it has been decided that less than the sum demanded may be recovered. *Aylett v. Lowe*, 2 *Bl. R.* 1221. *Walker v. Witter*, *Doug.* 6. Lord *r. Houston*, 11 *East*, 62. but it must be understood that there be no variance in the description of a written instrument or deed, 1 *Saund.* 288. n. 1. Former objections.

As to wager of law, "it is not quite out of use, though still it is not out of force." The earlier editions of *The Commentaries* must be read with caution, where it is said that, "this action is the shortest and surest remedy," but that "indeed actions of debt are now seldom brought, except upon special contract under seal, wherein the sum due is clearly and precisely expressed; for in case of such an action upon a simple contract, the plaintiff labours under two difficulties," 3 *Comm.* 155. the difficulties are those above stated. One of these difficulties is wholly removed by the later decisions mentioned, and the other is admitted by the very

learned commentator himself to be obsolete in use, to be indeed law; but not to be practice, 3 *Comm.* 348. Yet wager of law is talked of at least, for in *H. 4 G. IV.* K. B. was moved to appoint or limit the number of compurgators; but the court declined to interfere, although a passage from the old book, entitled, "Termes de Ley" was much pressed upon them; and also some more modern notices. See title WAGER OF LAW.

Where debt will lie or not.

It is laid down that debt will not lie against an acceptor of a bill of exchange. Hard's case, 1 *Salk.* 23, nor for a wager, *Ld. Raym.* 69. An ingenious editor has suggested a *quære*, whether debt would not now lie against an acceptor; but Lord Eldon, C. J. in *Bishop v. Young*, the case, referred to, did not seem to doubt Hard's case, 2 *Camp. N. P. R.* 187. n. And I have often drawn in debt against acceptor and never heard of any objection being made. It is quite untenable as against a drawer or indorser at the suit of a plaintiff acceding to the bill subsequently to the original parties.

And it may be brought by the payee against the maker of a promissory note, but such note must by its tenor, appear to be given for a consideration, as for value received. *Bishop v. Young*, 2 *B. & P.* 78. and in *Rudden v. Price*, 1 *H. Bl.* 547, it was determined that debt will not lie on a promissory note payable by instalments, till the last day of payment be past.

As to *debet* and *detinet*.

In common cases between the original parties, the declaration states that the defendant *debet et detinet*, "owes to and detains the debt from the plaintiff;" but where the parties sue or are sued as executor, or administrator, it is usual to say *detinet*, "detains," only.

This, it will be obvious, is where the debt itself was contracted between the parties, of whom the executor or administrator may be representative; but where executor or administrator sells the goods of his testator or intestate, or where the wrong is done in his own name, he shall sue in the *debet* as well as in the *detinet*, 1 *Rol. Abr.* 602, 633.

But this reasoning does not apply to the case of baron and feme, sued for a debt contracted by the feme before marriage; for the baron having the disposal of all the feme's goods, &c. to his own use, the action must be in the *detinet* as well as in the *debet*. The distinction seems to arise from the executor having the disposal of the goods, &c. to the use of another. *Walcot and Powell's case*, 3 *Leon.* 206.

As to process in debt.

To proceed in debt as in account, that is, by *capias* to arrest, &c. is allowed by stat. 25 *E. III.* c. 17. See titles *Ac ETIAM. AFFIDAVIT OF DEBT, Forms*, ante.

As to the declaration.

As the process in debt is by original writ, the declaration should commence by stating, that the defendant was *summoned* to answer; but an omission of the word "summoned," though informal, is not demurrable, by reason thatoyer of an original writ cannot now be had, 1 *Saund.* 318. (3.)

As to the venue in debt.

The venue in the action of debt is sometimes transitory and sometimes local. It is local where the action is founded on privity of estate; and transitory where founded on privity of contract, 1 *Saund.* 8. (2). It is a general rule that in penal actions the venue must be laid in the county where the supposed offence was committed.

Nor can the venue in general be changed; but under special circumstances it may. *Hodinott v. Cox*, 8 *East*, 268. See title VENUE.

There are some nice distinctions; as where an executor of a lessee is sued upon the privity of estate, &c. but these, as well as indeed many of the observations already introduced, properly belong to *pleading* rather than to practice.

In a declaration in debt in C. P. it is unnecessary to refer to the *clausum fregit* of the writ, and an averment in such declaration under a *videlicet*, that that court was sitting on a day in vacation may be treated as surplusage. *Lockett v. Plummer*, 2 *B. & B.* 659.

But as in debt, the count states that defendant undertook and agreed, not undertook and promised, which is the form in *assumpsit*, and therefore counts in one cannot be joined in one declaration. *Brill v. Neele*; 1 *Chit. R.* 619.

As to debt on bond, see title LIMITATIONS OF ACTIONS, *Table of Limitations of Actions*.

The plea to an action of debt is, to a deed, *non est factum*; to a debt on simple contract, *non debet*; to debt for rent, not by *nil debet*; *Hard.* 392; *non demisit*, he did not demise, nothing in arrear, or that he never entered; to debt on record, *nul tiel record*. As to the plea

In debt upon the statute for not setting out tithes, not guilty or *nil debet*, are good pleas. *Johns v. Carne*, *Cro. Eliz.* 621. *Coppin v. Carter*, 1 *T. R.* 462.

One of the advantages attending the bringing debt on simple contract, is, the saving of time and expence, by its being unnecessary to execute a writ of inquiry; but *semble*, that in debt on simple contract, this writ is not always unnecessary; as in debt for the value of foreign money, and other cases in which a judgment by default is an admission of the contract in the declaration, but not of the exact sum mentioned in it. *Brill v. Neele*, 1 *Chit. R.* 619, 620. n.

In debt for use and occupation after judgment by default, *semble*, that a writ of inquiry is necessary before signing final judgment. *Arden v. Connell*, 5 *B. & A.* 885.

The judgment in debt is, that the plaintiff recover his debt, together with his damages and costs. See title JUDGMENT, *As to the judgment.*

Forms.

See titles BOND. BREACHES. DECLARATION, *Forms*.

DECEIT or DISCEIT, *Action of Deceit or Disceit*.

This ancient form of action for deceit or injury, is superseded by the action on the case, or, which is the same thing, in tort, for damages for the deceit. In the particular case of a lord of manor, whether ancient demesne or not, where a fine or recovery had been had in the king's court of lands lying within his jurisdiction, which lands would be thereby turned into frank free; the lord, for such wrong, seems to have no other remedy than by writ or action of deceit or disceit, 3 *Comm.* 165.

To introduce abstruse or recondite learning into a work professing generally to be practical, though on a practical head, would

DECEIT OR DISCEIT, &c. DECLARATION.

be somewhat out of place; and the more especially so, as a book of this description, and indeed any compilation of the present day cannot be deemed authority in any proceeding requiring minute investigation of numerous authorities, not only as to the practice but as to the law, and as to both the most scrupulous accuracy.

On this particular head, neither the law nor the precedents lie on the surface; but the cases of the Countess de Plymouth *v.* Samuel James, and al. 1 *Lutw.* 711. and of Humfry *v.* Bathurst, *id.* 740-9, contain both; and even the learned reporter, as to writ of disceit in the case reported, seems to complain of the paucity of precedents; he says "*ne jeo poy trover ascun president en toutes mes livres d'entries, &c. forsque trois,*" to which he refers.

Other cases are reported. *Zouch v. Thompson*, 3 *Lev.* 415. 1 *Ld. Raym.* 177. S. C. *Rex v. Serjeant Mead*, and al. 2 *Wils.* 17. In an action on the case in the nature of a deceit, to reverse a recovery, it was held that all the parties to the recovery must be before the court. See *The King v. Hadlow*, 2 *Bl. R.* 1170.

DECLARATION.

What.

The declaration is a complaint exhibited in writing, in a court of justice; or it may be termed a written specification of a cause of action. The first explanation, though it be strictly in conformity with the older pleadings, is offered with deference. It is also called a count; more anciently it was called the *tale*, afterwards *narratio*; both terms clearly referable to that period of our jurisprudence when the pleadings were oral.

This head may be usefully treated under the following sections:

- I. Practical points, common to the form of declaration, generally.
- II. Practical points distinguishing the form of the declaration in each court.
- III. Cases as to time for declaring, K. B.
- IV. Cases as to delivering and filing declaration, K. B.
- V. Practical Directions, K. B.
- VI. Forms, K. B.
- VII. Cases as to time for declaring, C. P.
- VIII. Cases as to delivering and filing declaration, C. P.
- IX. Practical Directions, C. P.
- X. Forms, C. P.
- XI. General Forms.

I. PRACTICAL POINTS, COMMON TO THE FORM OF DECLARATION GENERALLY.

In mentioning these a distinction presents itself, namely, those points which relate to the declaration generally, and those which relate to its formal and office regulation.

The first mentioned points properly concern the pleader; but a general knowledge of the formal points of the declaration is as important to the attorney as to the pleader; and many of these I shall, therefore, endeavour concisely to illustrate.

When the defendant is in court, the plaintiff may declare in whatever form of action the nature of his true injury may require; but,

How plaintiff
may declare.

by holding the defendant to bail on a special *ac etiam*, or by having adopted a particular description of process, he binds himself so to declare. And where two or more defendants are held to bail jointly, on a promissory note, he cannot declare against them separately, though the note be also joint and separate. *Lewin, Executor, v. Smith*, 4 *East*, 589. See also *Moss v. Birch*, 5 *T. R.* 722. and the cases there cited. *Chapman v. Eland*, 2 *N. R.* 82. *Thompson v. Cottee*, 1 *M. & S.* 55. The declaration may not vary from the process where the nature of the demand may be varied. *Canning v. Davis*, 4 *Burr.* 2417. See also *Lloyd v. Williams*, 2 *Bl. R.* 722. where, however, it was held, that if the variance narrowed the plaintiff's suit, variance was not fatal.

The declaration must be clear, true, and certain; it must not only establish a title in the plaintiff, but must destroy the defendant's, for *melior est conditio possidentis*. *Vaugh.* 58. 60. It must also contain the gist, and every thing that is of the essence of the plaintiff's action, and that seems properly to be the essence of the action, without which the court could have no sufficient grounds to give judgment; and what that is, is to be determined in every action, according to its nature. *Doct. Pl.* 85.

What declaration must contain.

But it may be observed, that although the plaintiff must set forth in his declaration every material thing, without which he could not be entitled to his action, yet herein the law requires no greater certainty than the nature of the thing is capable of. *Keech v. Knight*, 3 *Lev.* 319.

The declaration must also be traversable; and, therefore, must contain certain affirmation; for if there be no certain affirmation, it will not be cured after a verdict, because it is a defect in substance.

Must be traversable.

In describing injuries done with relation to things, in the declaration, the law requires no greater certainty with respect to them, than it does in respect to things, to describe which may be essential to the action, as above observed.

Injuries, how described.

In all cases, where an interest or estate commences upon condition, the plaintiff ought to shew it in his declaration, and aver the performance of it; but where the interest of the estate passes presently, and vests in the grantee, and is to be defeated by condition, there the plaintiff may count generally, and the condition shall be pleaded by him who is to take advantage of it, 7 *Co.* 10. *Lill. Reg.* 418.

These positions or maxims might be illustrated, by particular cases, but very slight reflection will shew them to be well founded on principles of substantial justice; for the substantial rules of pleading, according to which declarations are to be drawn, are founded in strong sense and the soundest and closest logic, and so appear when well understood and explained, 1 *Burr.* 319.

Rules of pleading, how founded.

It may be well to mention the formal points in their order of occurrence in the declaration. For preventing unnecessary length of declarations, it has been specially ordered that in actions of covenant the declaration is not to repeat more of the deed than is necessary for the assignment of the breach, and not to repeat the covenants in the conclusion. In actions of slander long preambles are to be forborne, and no more inducement than what is necessary

Some formal points of the declaration. As to length, &c.

DECLARATION; I. *Practical Points, common, &c.*

for the maintenance of the action; but when it requires a special inducement or *colloquium*. In actions upon general statutes, the declaration not to repeat the statute, but to conclude "against the form of the statute in such case made and provided." In actions of debt upon judgments had in the courts at Westminster, to recite only the judgment; but if on a judgment had by or against an executor or administrator, then the action of debt upon that judgment to repeat the declaration and judgment, *R. G. M.* 1654. s. 13. In a declaration on action founded on a deed, the plaintiff need not set forth more than that part which is necessary to entitle him to recover. *Dundas v. Lord Weymouth*, *Comp.* 665. And it will be sufficient to state the substance and legal effect even of such part which is shorter, and not liable to mis-recitals and literal mistakes. The distinction is between that which may be rejected as surplusage, (which might have been struck out on motion), and what may not; where the declaration contains matter foreign to the cause, and which the master, on a reference to him, would strike out (irrelevant covenants for instance) that will be rejected by the court, and need not be proved. But if the very ground of the action is mis-stated, as where the plaintiff undertakes to recite part of a deed, on which the action is founded, and it is mis-recited, that will be fatal; for then the case declared upon is different from that which is proved, and he must recover *secundum allegata et probata* according to what is alleged and what is proved. *Bristow v. Wright*, *Doug.* 665. This case, and the notes subjoined, contain a summary of the principles applicable to the question of requisite length or brevity of the declaration.

How entitled.

The court, and term, and occasionally the day in the term, of exhibiting or filing the declaration, require attention. It must be entitled always after the cause of action is stated to have accrued, and should be entitled of the term in which the writ is returnable, though it be not delivered till the following term, or afterwards. *Smith v. Muller*, 3 *T. R.* 624. *Topping v. Fuge and Another*, 1 *Marsh.* 341. or of that of the appearance. *Id. ib.* But where several defendants appear [or put in bail?] in different terms, the declaration should be entitled of the term wherein the last appearance [or bail?] was entered [or put in?]. *Stock v. Herbert and Eyton*, 1 *Wils.* 242. It may indeed be entitled of the term in which it is delivered, but it may also, on judge's order, be entitled of the term writ returnable; and this to preclude any further claim. *S. C.*; but if the cause of action is stated in the declaration to have accrued *after*, not on the first day of the term in which the writ is returnable, the declaration must be entitled of a subsequent day in that term, and not of the term generally? and the reason of this special entitling is necessary, for otherwise it would appear that the action was commenced before the cause of action accrued; but the declaration is good if entitled generally of the term, although the action shall have arisen on the first day of the term. *Pugh v. Robinson*, 1 *T. R.* 116. for the promise and breach, being laid on the first day of the term, may be presumed to have been made before the delivery of the declaration, and by a reference to the ancient practice of declaring *ore tenus*, the declaration cannot be supposed to have been delivered till the sitting of the court on that

day. *Pugh v. Robinson*, 1 *T. R.* 116. See *Declaration* title *AMENDMENT, Table*.

The next important part of the declaration in order to be treated is the venue. See title *ORIGINAL WRIT, Practical Directions on the part of the Plaintiff*, K. B. VENUE. Indeed, as it is said that the venue in the margin may help, but cannot hurt, the mention of the venue might have been postponed; but it is usual to commence the body of the declaration with the venue, and although it need not be, yet, it always is first considered. Of the venue.

It may be observed, that in C. P. where the defendant having been outlawed in London, reverses his outlawry on due appearance, the venue, whether local or transitory, it is said, may be laid in any county. *Whitwick v. Hovenden*, 3 *Lev.* 245. *Quare*, if the action properly belong to London?

On VENUE, somewhat will have appeared, under the title DEBT.

But it is no objection to a declaration that the parties having been once called by their names are afterwards designated by the terms "the said plaintiff" and "the said defendant." *Davison v. Savage*, 2 *Marsh.* 101. *Stephenson v. Hunter*, 6 *Taunt.* 406. S. C. *Davison v. Savage*, 6 *Taunt.* 121. S. P.

In K. B. the plaintiff is first named as complaining; in C. P. the defendant is first named as having been attached. The parties.

If the defendant appear by his right name, the plaintiff may declare against him in the name by which he appears, stating that he was arrested or served with process by the other, for by appearing the defendant admits himself to be the person sued, and so the variance is immaterial. *Green v. Robinson*, *H.* 23 *G. III.* K. B. *Boyne v. Mills*, *M.* 25 *G. III.* K. B. 1 *Tidd*, 458.

In a subsequent case the proceedings were set aside where the process was to answer the plaintiff as assignees of a bankrupt, and the declaration was in their own right; for the plaintiff cannot declare against the defendant generally on process sued out in a special character. *Meggs and Another, Assignees of Cockran, v. Ford*, *E.* 25 *G. III.* K. B. 1 *Tidd*, 459.

It is required next to state the nature of the plea. But this last statement may be altogether omitted in the preamble to the declaration. The declaration itself is a description of the cause of action.

The next point requiring attention is as to the day of the cause of action accruing. The importance or not of this day being truly stated, will depend upon the nature of the action. Of laying the day.

In common *assumpsit*, trespass, assault and battery, &c. the day is immaterial; but on a note, bond, or instrument, the day of the date should in general be truly stated; but the exact date of a bill or note, does not seem to be indispensable; e. g. a bill or note may not be dated: or the plaintiff may be ignorant of the date; in such cases, the day specified may be that on which the bill or note was known to him to have been issued; but if there be any doubt as to the date, the declaration may state that the bill or note was made on a day; but then, a statement that it bore date on that day should be omitted.

The parts of the declaration following these details the cause of action, and it concludes with alleging the plaintiff's damage, or The damages and conclusion.

DECLARATION; I. *Practical Points, common, &c.*

that the breach assigned is to the plaintiff's damage of a sum specified. This sum should be laid sufficiently large to cover not only any injury actually sustained, but also any which a jury might award. In actions for criminal conversation the jury have sometimes given the whole damages laid, and probably would have exceeded them, had they been laid sufficiently large in the declaration; but in debt on bond the damage laid is immaterial, whether a farthing or £10. In both courts the declaration concludes with stating that the plaintiff therefore brings suit or prays relief, and in K. B. pledges (nominal are added). In C. P. the pledges are only added in proceedings against attornies.

An ambiguous expression in a declaration is cured by verdict, and must afterwards have been taken to have been used in that sense which would sustain the verdict. *Lord Huntingtower v. Gardiner*, 1 B. & C. 297.

In Heath's Maxims is contained a highly-scholastic enumeration of the requisites of a declaration, and as there defined it would appear to be a perfect syllogism. And see *System of Pleading*, page 158.

What is said above relates to where the declaration contains one count only; but in many actions, especially in assumpsit, trespass, and slander, it is usual to add one, or as the occasion may require.

Joinder of counts.

In an action against the drawer of a promissory note for instance, after the special count, it is usual to add what are called the money counts; these are, a count for money lent and advanced to the defendant; one for money paid and laid out for his use, one for money had and received by him to the use of the plaintiff; one or more comprehending the consideration for the note; as for goods, labour, &c. and lastly, one for money due on account stated between the parties.

As to joining counts on causes of action seemingly different, the rule appears to be this, namely, that whenever the same plea to such different counts will be good, and the judgment the same, such counts may be considered well joined. *Brown v. Dixon*, 1 T. R. 274.

Misjoinder of counts, or what is nearly the same thing, the misstatement in the same declaration of causes of action requiring different forms of action is demurrable, or ground of arrest of judgment. And considering the general diffusion of pleading knowledge, from the number of its respectable professors, cases of this description are not likely often to occur. Yet lately, where assumpsit and trover were apparently joined, and therefore the bad count held demurrable, see *Orton v. Butler*, 1 D. & R. 28.

Striking out unnecessary counts, &c.

The declaration unnecessarily lengthened, either by numerous counts or by recitals, may, on motion, as observed above, be referred to the master or prothonotary for his opinion thereon; but in K. B. where time for pleading has been obtained, it cannot be done. *Wilkins v. Perry*, *Ca. temp. Hardw.* 129.

It seems otherwise in C. P. *Law v. Williamson*, H. 31 G. III. *Imp. C. P.* 170.

In this last case Lord Loughborough, C. J. is reported to have said, "in my opinion it would not be too late after verdict." The rule is to shew cause, and if the case be flagrant, the plaintiff may

also be called upon to shew cause why he should not pay the costs of the application.

But where the plaintiff having obtained leave to amend a count in his declaration, adds new counts which contain no new cause of action, but only vary the manner of stating that which was demurred to, the court will not order them to be struck out. *Brown v. Crump*, 1 *Marsh.* 609.

The due relation which the declaration may bear to the plaintiff's demand, will more fully appear by a reference to the bill of particulars.

See title PARTICULARS, *Bill of Particulars.*

In an action against forty-six defendants, where the declaration contained two counts for work done by plaintiff as an attorney, and two more for work done by him, without saying in what capacity, the court ordered two counts to be struck out, and the word "defendants" to be substituted for the names of the defendants in all the places where they occurred, except the first. *Meeke v. Oxlade*, 1 *N. R.* 289.

But in a declaration on a bill of exchange the court refused to strike out as unnecessary a count for interest, though besides counts on the bill, the declaration contained the usual money counts. *Thomas v. Hanscombe*, 1 *Bing.* 281.

In an action on a bill of exchange by the payee against the acceptor, when the declaration contains special count on the bill with counts for work and labour, and the money counts and the particulars are confined to the cause of action on the bill, the court will not grant a rule for striking out the common counts if there be no complaint of vexation. *Nichol v. Witton*, 1 *Chit. R.* 448.

So counts cannot be struck out as superfluous unless they appear to be so on the face of the declaration. *Williams v. Thompson*, *Id.* 449. n.

Neither where there is a material difference between the counts will the courts determine upon affidavits, whether they are well founded in point of fact, for if not the plaintiff will be sufficiently punished by paying the costs which he will be subject to on such of the counts as are found for the defendant. *Turner v. Kingston*, *H.* 23 *G. III.* K. B. *Hurd v. Cock*, *M.* 36 *G. III.* K. B. 1 *Tidd*, 638.

So likewise where a declaration which was in debt for penalties on the stat. 9 *Anne*, c. 14. consisted of 480 counts, for money won at play of different persons at different times, and a rule nisi was granted for limiting the declaration to ten counts, the Court of King's Bench, on shewing cause, discharged the rule with costs. *Cowan v. Berry*, *E.* 38 *G. III.* K. B. 1 *Tidd*, 638.

And where a declaration consisted of 286 counts, upon as many bankers notes for a guinea each, payable to bearer, with the common counts for money lent and money had and received, the court refused to strike out the counts upon the notes, as it might have put the plaintiff to unnecessary difficulty in proof at the trial, or make it necessary for him to have a writ of inquiry on a judgment by default. *Lane v. Smith*, *M.* 46 *Geo. III.* K. B. 1 *Tidd*, 638.

Yet see *Carmack and Others v. Gundry and Another*, 3 *B. & A.* 272, where it was referred to the master to strike out all the counts on the notes, (98) except the first; the defendant undertaking to

DECLARATION; II. *Points distinguishing, &c.*; III. *Cases, &c.*

permit all the other notes to be given in evidence upon the count upon the account stated, and not to bring any writ of error. The costs of those counts and of the application were to be costs on the cause.

But where the declaration contains special counts for work and labour, besides the general counts the special counts may be struck out on motion if they appear unnecessary, and the rule was made absolute with costs when plaintiff was an attorney. Anon. 1 *Chit. R.* 449, n.

So where a declaration contained besides the usual money counts the *indebitatus* and *quantum meruit* counts for work and labour as an attorney, and two similar counts for work and labour generally, the court referred it to the master to strike out the latter for superfluity before the issue was made up. *Gabell v. Shaw*, 1 *D. & R.* 171.

So will refer it to the master to determine whether superfluous counts in a declaration are introduced vexatiously. *Newly v. Mason*. *Id.* 508.

The court will not refer a declaration to the master to strike out superfluous counts, but he will on motion order them to be struck out if they appear vexatious. *Bayley v. Watkins*, 1 *Chit. R.* 450.

Declarations may
be consolidated.

The principles which appear to have guided the decisions respecting consolidating declarations, are treated under title CONSOLIDATING ACTIONS, which see. Also, see title VARIANCE.

II. POINTS DISTINGUISHING THE DECLARATION IN EACH COURT.

The plaintiff, at the commencement of the declaration in the court of K. B. by bill, complains of the defendant being in the custody of the marshal of the marshalea, &c.

The declaration in the court of C. P. and also where proceedings are by original in K. B. begins with reciting the original writ, and therefore states that the defendant was attached to answer the plaintiff, &c. and that the plaintiff, thereupon, by his attorney, complains, &c.

It does not seem to be necessary in either court, that in the preamble of the declaration any statement or allusion should be made to the nature or description of the plea or action.

The conclusion also is different; that of K. B. concluding with the addition of pledges; the C. P. except in proceeding against attorney, &c. omitting them.

III. CASES AS TO TIME FOR DECLARING, K. B.

The plaintiff, by the general rules of law, may declare at any time within a year after the return of the writ. *Worley v. Lee*, 2 *T. R.* 123. S. P. *Penny v. Harvey*, 3 *T. R.* 123. but by the rules of the courts, if he do not declare within two terms, (that in which the writ is returnable being reckoned one) after the return of the writ the defendant may sign judgment of *non pros* for want of declaring in time. *Worley v. Lee*, *ubi sup.* S. P. *Sherson v. Hughes*, 5 *T. R.* 35. and this whether called upon by rule or not. *P. R.* 121. but in bailable actions the two terms are reckoned from the putting in and perfecting special bail. 1 *Sel.* 222. but it is said, that if bail do not justify until the term following that where the writ be returnable

the plaintiff may in that term deliver his declaration, and the defendant is not entitled to an imparlance. *Rolleston v. Scott*, 5 T. R. 372.

So where the defendant had neglected to put in and perfect bail above, K. B. held, that the plaintiff was not out of court by omitting to declare in the original action within two terms after the return of the writ; but he might still take an assignment of the bail bond. *Carmichael v. Chandler*, T. 24 G. III. K. B. 1 Tidd, 321, 328.

A declaration after two terms from the term in which the writ is returnable will be set aside; but not the process for the cause is already out of court. *Wynne v. Clarke*, 5 Taunt. 649.

An appearance entered after the essoign day and before the day of full term may be entered as of the preceding term; and therefore a *non pros* entered after the second term, for want of declaring before the end of such second term, is good. *Prigmore v. Bradley*, 6 East, 314.

Should not the plaintiff be willing to declare within the two terms, as above mentioned, he may apply for a rule for time to declare; this rule must be obtained before the expiration of the second term; the time for declaring becomes thereby enlarged to the first day of the next term; and on that day a similar rule may be obtained, by which the time for declaring is extended to the last day of that term. By this proceeding the defendant may be prevented from signing judgment of *non pros*, on the expiration of the two terms, without notice to the plaintiff; but the defendant may, on his part, move the court that the last rule obtained by the plaintiff may be peremptory. This rule being also peremptory, it will behove the plaintiff to declare in time; otherwise judgment of *non pros* may be signed immediately on the expiration of the rule to declare. *Towers v. Powel*, 1 H. Bl. 87. and the rule to declare may be obtained and served at any time before *non pros* signed. *Jans, q. t. v. Hutton*, 1 Bl. R. 290.

The rule to declare in replevin (and it may be presumed in other cases) may be served at any day before the time the rule is expired, and the plaintiff must declare within four days after such service. *Edwards v. Dunch*, 11 East, 183.

A rule to declare cannot be obtained where the defendant is in custody, unless under special circumstances; as for instance, where the action is joint, and some or one of the defendants has not appeared, or is not outlawed; and then an order in vacation, or a rule in term, may be obtained for time to declare, until the appearance or the outlawry of the other defendants. *Tracy v. Garmston*, Bar. 396. but on the application for the rule it must be shewn, that the plaintiff is using all due diligence in proceeding against the other parties.

One of two defendants having been holden to bail in Trinity Term, the plaintiff proceeded to outlawry against the other, and delivered a declaration against the former not having obtained a rule for time to declare: held that the cause was out of court, and the bail entitled to an *exoneretur*. *Sykes v. Bawens*, 2 N. R. 404.

If a defendant be outlawed, and afterwards he duly appear, the outlawry being reversed, the plaintiff has two terms from the reversal to declare against him. *Com. Dig. tit. Pleader, C. 4.* but the

DECLARATION; IV. Cases as to delivering, &c. K.B.

plaintiff shall not be *non prossed*, *ibid.* for he is at liberty to sue a new original. Jon. 443. March. 9.

But the time for declaring may be virtually enlarged by the act of the parties; as where they are in treaty, and this though the defendant be a prisoner. Walker v. Steward, 3 Wils. 455. And see Carmichael v. Chandler, 1 Tidd, 321. 328. cited *ante*, pa. 435.

It may be observed, that there cannot be an *essoign* in a personal action. Rooke v. The Earl of Leicester, 2 T. R. 16.

IV. CASES AS TO DELIVERING AND FILING DECLARATION, K.B.

In chief.

The declaration may be delivered or filed in chief; that is, where the defendant has appeared, either by his own act, by the plaintiff having duly filed common bail for him according to the statute; until the defendant is regularly in court, the plaintiff cannot declare against him in chief. Cook v. Raven, 1 T. R. 935. Smith v. Painter, 2 T. R. 719.

And where a defendant renders in discharge of his bail after a declaration has been filed conditionally, and notice served upon him, and rule to plead given, it is not necessary to deliver another declaration for the defendant in custody. Thompson v. Cary, 1 Chit. R. 72.

De bene esse.

Or the plaintiff may declare against the defendant *de bene esse*, or conditionally, which "conditionally" means until the defendant shall be regularly in court; this he cannot be, unless common bail be duly filed, or special bail duly perfected.

For it has been ruled, that the plaintiff may file or deliver the declaration *de bene esse*, or *conditionally*, where process returnable before the last return of any term, at the return of such process with notice to plead in eight days after the filing or delivery thereof. Carmichael v. Chandler, T. 24 G. III. K. B. 1 Tidd, 462.

And a declaration must be filed or delivered conditionally, before the defendant has appeared, and even before the time for his appearing, or putting in bail is expired, but never afterwards. Fotherby v. Lloyd, Bar. 342. Baker v. Cooper, 6 T. R. 548. See also Smith v. Painter, 2 T. R. 719. and whether action be, or not, bailable. Kenman v. Bean, 2 N. R. 433.

It has been said that the return-day of the writ is the soonest that the declaration can be delivered or filed *de bene esse*, or conditionally; and where an original is returnable on the *essoign* day of the term, the declaration cannot be delivered *de bene esse* till the first day of the term. Burgh v. Dixon, 14 G. II. 1 Sel. 227. but it seems the court have since determined otherwise; for where defendant having been arrested on a *capias*, returnable on the first return of the term, on the day before the *essoign* day, took out a summons to stay proceedings upon payment of the debt and costs; on the *essoign* day plaintiff filed a declaration *de bene esse*, and on the day after the *essoign* day, defendant obtained an order to stay proceedings: held, that the plaintiff was entitled to the costs of the declaration. Fawcett v. Christie, 2 B. & P. 515. But it is said to be the practice, that where the *essoign* day or first return in C. P. happens on a Sunday, the declaration *de bene esse* cannot be delivered till the Monday.

The *essoign* day is, however, considered for many purposes the first day of the term. Belk v. Broadback, 3 T. R. 185, and par-

ticularly in this case, where a writ was pleaded as sued out on a day between the essoign day and the first day of the term, and this being specially demurred to, the objection was not allowed to prevail, though the court doth not, in fact, sit till the *quarto die, post*.

The following rules respecting declarations delivered or filed *de bene esse*, should be perused with care; especially as they appear to have received different interpretations by Mr. Serjeant Sellon and Mr. Tidd.

Rules of court
respecting de-
claration *de bene*
esse.

It is ordered, that upon all process to be issued out of this court, returnable before the last return of any term, where no affidavit shall be made and filed of the cause of action, pursuant to the acts of parliament for preventing vexatious arrests, the plaintiff may file or deliver the declaration *de bene esse* at the return of such process, with notice to plead in eight days after the filing or delivery thereof, and if the defendant doth not file common bail, and plead within the said eight days, the plaintiff having filed common bail for such defendant, according to the said act, may sign judgment for want of a plea; provided that such declaration be delivered or filed, and notice thereof given four days exclusive before the end of such term, and a rule to plead be duly entered.

R. G. T.
22 G. III.

And it is further ordered, that upon process to be issued and made returnable as aforesaid, where an affidavit shall be made and filed of the cause of action, pursuant to the said act, the declaration may be filed or delivered *de bene esse*, at the return of such process, with notice to plead in four days after such filing or delivery, if the action be laid in London or Middlesex, and the defendant live within twenty miles of London; and in eight days, if the action be laid in any other county, or the defendant live above twenty miles from London. And if the defendant puts in bail, and doth not plead within such times as are respectively before mentioned, judgment may be signed, provided that such declaration be delivered or filed, and notice thereof given four days exclusively before the end of such term, and a rule to plead be duly entered.

In the former edition of this compilation, the point in difference between Mr. Serjeant Sellon and Mr. Tidd was stated, and with deference commented upon at some length; but what is there printed, is in the present edition omitted, for it is now recognized K. B. that a plaintiff cannot declare *de bene esse* upon process returnable the last return of the term. *Key v. Browne*, 3 D. & R. 28. 1 B. & C. 653. S. C.

Upon inquiry, I find it to be the practice in C. P. that on a writ returnable the last return of the term, the defendant may, on the day after such return, file or deliver a declaration, with notice to plead in four days in the same term, and that thus the plaintiff will be entitled to a plea of such term. See sec. viii. *post*.

It seems that the eight days time, when defendant is to plead, is reckoned from the delivering or filing of the declaration, be it sooner or later; and if the defendant do not file common bail, and plead within that time, plaintiff having filed common bail for defendant, and given a rule to plead, may sign judgment. *Shadwell v. Angel*, 1 Burr. 55. The notice, however, is the criterion of the time of such filing or delivering; see *post*.

DECLARATION; IV. *Cases as to delivering, &c.* K. B.

An indorsement or notice, that the declaration is filed or delivered conditionally, or *de bene esse*, should appear distinctly. *Eyans v. Tillam*, *Bar.* 257.

By the bye,

Except where the defendant is in court, by the plaintiff's filing common bail for him, he, being in court, may be declared against by *any* person without a new process or writ, and by a third person, without there being any declaration in chief at the suit of the original plaintiff. *Con. Phillip's case*, 1 *Cromp.* 96. and if so declared against, it is called declaring *by the bye*, or delivering or filing a declaration *by the bye*; but such declaration at the suit of any other person than the original plaintiff, it is said, must be filed the term the writ is returnable. *Sulyard v. Harris*, 4 *Burr.* 2180; it may seem, however, to be within the reason of this rule of practice, that the declaration by the bye may not be delivered or filed until the defendant be in court; and that then, though after the term the writ be returnable, a declaration by the bye may be filed or delivered. For the rule laid down in *Lil. Pr. Reg.* 409, and 413, is this—"If one be in the custody of the marshal, any one may deliver a declaration against him *de bene esse*." Here is no limitation as to the term the writ is returnable. Perhaps the dicta or decisions may be reconcilable, by intending that the declaration shall be entitled of the term the writ is returnable.

But it appears that if the defendant be not in court, either by his own voluntary appearance, or in custody, only the same plaintiff can deliver a declaration by the bye. *Wallis v. Smith*, *Ca. temp. Hardw.* 207. *Styles*, 47. and in that case such plaintiff may declare by the bye against him at any time before the end of the next term after the return of the process. *Smith v. Muller*, 3 *T. R.* 624. *ad fin.* provided however that there be a declaration in chief. *Tetherington v. Golding*, 7 *T. R.* 80. *Delves, q. t. v. Strange*, 6 *T. R.* 158; but the taking out of the office a declaration by the bye, which was filed, before any declaration in chief, is a waiver of the irregularity. *Archer v. Barnes*, 3 *East*, 342. A declaration may be delivered by the bye after payment of debt and costs in the original action, provided it be delivered of the same term in which the writ is returnable. *Hand v. Willett*, *P. R.* 144. So-after entry, *quod villa cassetur*. *Milles v. Andrews*, 5 *T. R.* 634.

Where defendant has been held to bail in *assumpsit*, and the plaintiff declares in trover, as if by the bye, it is irregular in K. B.

If the proceedings are by original, a declaration by the bye can only be delivered by the same plaintiff as in C. P.

As the filing or delivering of the declaration is only good from the notice, I shall treat of that before the filing or delivery of the declaration.

Notice of declaration,

In K. B. it has been held necessary, in all cases, to give notice of declaration.

In C. P. where the declaration had been filed conditionally, no notice was formerly held necessary; but now by *R. G. E. T.* 49 G. III. 1 *Taunt.* 616, it is ordered that in every action in which special bail shall be required, and where the declaration shall be filed conditionally, notice in writing of such declaration

being so filed, shall be given to the defendant, his attorney, or agent; and that no declaration shall be considered as filed, until such notice shall be given.

It appears that the declaration is only well filed or delivered from the time at which the notice was given, whether it be in chief or *de bene esse*. *Hutchinson v. Brown*, 7 *T. R.* 298; and if it be served at any time within the twelve months from the return of the writ, it will be good, provided the defendant has not signed judgment of *non pros*. *Worley v. Lee*, 2 *T. R.* 112. *Penny v. Harvey*, 3 *T. R.* 123.

The notice must be in writing, and it should contain, (1.) A technical description of the nature of the action. *Parsons v. Smith*, *P. R.* 131. *Skin v. Guinnell*, *Id.* 133. *Graves v. Wise*, 2 *Wils.* 84. (2.) At whose suit it is filed or delivered. (3.) The time allowed for pleading thereto. (4.) That unless defendant plead thereto within that time, judgment will be signed, *R. G. K. B. T.* 1 *G. II.*; and notice to plead in four, when defendant is entitled to eight, is bad, though judgment be not signed till after the eight days. *P. R.* 135. (5.) It should be properly dated. *Hannaford v. Holman*, *Id.* 134. And the insertion of the damages is unnecessary. *Hetherington v. Hobson*, 6 *Taunt.* 331.

It will be obvious that the notice as to the time to plead, and the indorsement, should agree with each other.

The notice of declaration for Saturday, Sunday being the assign day of the term, held a nullity. *Moffat v. Carter*, 2 *N. R.* 75.

Serving notice of declaration filed together with the writ at the same time is irregular. *Steward v. Lund*, 12 *T. R.* 116. See however, *aliter*, *C. P.* *Haynes v. Jones*, 3 *Taunt.* 404. But it has been since ruled, that a defendant who is served with process and notice of declaration both on the return day of the writ, may treat the declaration and notice as a nullity. *Pope v. Turner*, 4 *Taunt.* 818.

But notice of a declaration having been filed *de bene esse*, may be given on the return day of the writ, at the time of serving it; but notice cannot be given on that day of a declaration having been filed in chief. *Walbank v. Abbott*, 1 *J. B. Moore*, 573.

In *C. P.* it must be served before nine in the evening, and before the rule to plead given. *Gray v. Sanders*, *Suppl. to P. R.* 34. Time of day of service.

Delivering notice of a declaration on a Sunday is bad. *Morgan v. Johnson*, 1 *H. Bl.* 628.

If not delivered to the attorney, it must be left at the last, or usual place of abode of the defendant. Or it may be put under the door of the defendant's house, though empty and shut up. *Wood v. Dodgson*, *Bar.* 278; and it seems that an effort must be made to deliver it to some person; for where it was put under the latch, and it did not appear that the person leaving the notice knocked or endeavoured to open the door, it was held ill. *Talbot v. Odeham*, *Bar.* 411. But where the residence of the attorney and the defendant is unknown, the notice may be stuck up in the office; but this is irregular if his last place of abode be known. *Holsten v. Culliford*, 1 *B. & P.* 214; or if previous leave of the Where.

DECLARATION; IV. *Cases as to delivering, &c. K. B.*

court for so affixing the notice in the office be not obtained. *Davis v. Mackenzie*, 5 *Taunt.* 777.

And where the defendant and his attorney had been informed that a notice of declaration was stuck up in the office, the court refused to set aside a judgment, for want of service of the notice at the defendant's last place of abode. *Rosemore v. Cohen*, 1 *N. R.* 279.

In the court of Exchequer, service of notice of declaration to found an interlocutory judgment, and authorise a writ of inquiry, is good, by affixing it on the door of the dwelling-house where the defendant last lived, if the plaintiff, or his attorney, do not know the place of his removal, and knowledge can be brought home to him; and in case of irregular service, the defendant should move the court before the execution of the writ of inquiry. *Cole v. Bennett*, 6 *Price*, 15.

And on its appearing the defendant kept out of the way to avoid service of process, and refused a letter sent by post, containing a notice of declaration, it was held sufficient service. *Aldred v. Hicks*, 1 *Marsh.* 8. 5 *Taunt.* 186. *S. C.*

Wherever process is served, there may notice of declaration. *Poulter v. Skinner*, *P. R.* 129.

Who to be served.

If the action be against two or more, though joint, notice must be given to all the defendants. *Coulson v. Turnbull*, *Bar.* 246. *Kingdon v. Horn*, *Id.* 293.

Of delivering or filing the declaration.

Nine in the evening is the latest that a declaration can be filed or delivered. *Bailey v. Dennis*, *P. R.* 123. *C. P.*

The defendant will be entitled to an imparlance, unless the declaration be filed or delivered four days exclusively before the end of the term. *Porter v. Barnes*, *Id.* 125.

See *Walgrave v. Taylor*, 1 *Ld. Raym.* 705, where it seems that a declaration was considered well delivered on a Sunday.

If the defendant's attorney be known, and live in town, a copy of the declaration must be delivered to him; if he live in the country, to his agent in town. *P. R.* 126. *White v. Edwards*, 2 *Ld. Raym.* 1408.

Where the residence of neither the defendant or his attorney is known, the declaration must be filed; and if known it is irregular to file it. *Oldham v. Burrell*, 7 *T. R.* 26. It must also be filed where common bail is entered according to the statute; and this, though the defendant be a practising attorney. *Heber v. King*, *P. R.* 128.

If a defendant in custody employ an attorney merely for the purpose of putting in bail, delivery of declaration to that attorney is not sufficient. *Dent v. Hallifax*, 1 *Taunt.* 493. but then it should seem that the plaintiff's attorney have notice of some other attorney acting for the defendant. Where there is reason for doubt inquiry should be made.

As to the indorsement on declaration delivered in chief.

In *K. B.* where the declaration is filed or delivered in chief, if it be a town cause, *i. e.* venue in London or Middlesex, and the defendant reside within twenty miles of London, the declaration must be indorsed for defendant to plead in four days from such filing or delivery; of a country cause, *i. e.* the venue elsewhere then in Lon-

don or Middlesex, the indorsement must be to plead in eight days. See *Holland v. Cooke*, 1 M. & S. 566.

Where delivered *de bene esse*, and the action be notailable, the declaration is always indorsed to plead in *eight* days; ifailable in four days if a town cause, or the defendant reside within 20 miles of London; and in eight days, if a country cause, and the defendant reside above twenty miles from London.

Indorsement,
where delivered
de bene esse.

The indorsement must contain a notice to plead; for, if a declaration be delivered, indorsed "delivered conditionally," a rule to plead given, and a demand of plea served, and judgment be signed for want of a plea, the court will set the judgment aside as irregular, there being no notice to plead. *Heath v. Rose*, 2 N. R. 223.

If one of three defendants in a joint action appear to a *quare clausum fregit*, and the other two being arrested onailable process, have till the ensuing term to justify bail, and the plaintiff previously to that time deliver a declaration against all three, indorsed "conditionally until special bail is perfected," this is irregular. *Turner v. Portall*, Id. 231.

It will be obvious that the indorsement and the notice should agree with each other; but where the declaration filed in the office before defendant's appearance was indorsed "filed conditionally," and judgment afterwards signed for want of a plea, the court held it regular; though the notice served on the defendant was of a declaration *generally*. *Cort v. Jaques*, 8 T. R. 77.

See title VARIANCE.

V. PRACTICAL DIRECTIONS, K. B.

If the cause of action be special, prepare instructions to be laid before counsel, or special pleader, indorsed "Mr. ———, to draw declaration." The instructions may usefully contain, (1.) An abstract or short copy of the writ or first proceeding. (2.) A copy of the instrument (if any) to be declared on verbatim et literatim; a copy, carefully examined with the original, may, preferably to the original, accompany the instructions. (3.) A sufficient statement of the facts of the case.

If the case shall have been already under the consideration of counsel, that, with the opinion thereon, and a short copy of the writ, together with a copy of any other instrument that may be judged requisite, and a statement of additional facts (if any), will be ample instructions for the drawing the declaration.

The declaration is to be engrossed fairly, and without obliteration of printed counts, and only on one side of the paper. *Champneys v. Hamlin*, 12 East, 294. *Hartop v. Juckes*, gent. one, &c. 1 M. & S. 709. Indorse the same with notice to plead, agreeably to Nos. 1, 2, 3, 4, as the case may require, FORMS subjoined. It should be carefully examined. File same if the defendant's attorney be unknown, and serve notice on the defendant by leaving it at his last place of abode, or if that be unknown, by sticking it up in the office, K. B.; the notice may be No. 5, 6, or 7, FORMS subjoined. If the defendant have appeared, either by putting in special bail, or by filing common bail, the declaration must be delivered to the defendant's attorney; and, if delivered, it must not be after ten o'clock in the evening; nor can the notice be served after that time: and if filed, of course it must be before the defendant's attorney can by the rules of the office search for it.

But be careful in aailable action not to deliver or file the declara-

DECLARATION; V. PR. DI.; VI. FORMS, K. B.

tion before special bail be perfected, as the doing so is a waiver of the bail, unless it be done *de bene esse* or conditionally, N. on R. G. T. 22 G. II. See also *Lister v. Wainhouse*, Bar. 92.

The delivery, of course, cannot be to the attorney in the country, but to the agent in town (if known). *Adderly v. Dixie*, Ca. Pr. C. P. 101.

Formerly, if the defendant's attorney refused to pay for engrossment, &c. of declaration what was charged on the back, the attorney for the plaintiff might forthwith file it, and give the notice to the defendant; but since it has been ruled, that both the declaration and the issue shall be allowed for on the taxation of costs, no charge for the declaration is indorsed thereon. R. G. H. 35 G. III. *Fuller v. Osborne*, 6 T. R. 477.

As the rule of court respecting the filing of declarations, and giving notice thereof, where common bail is filed, or appearance entered for the defendant, according to the statute, and also as to the subsequent proceedings, is very explicit, I have preferred inserting it under this head or title in the PRACTICAL DIRECTIONS.

R. G. T. 1 G. II.
B. R.

In all causes, where a copy of the process shall be served upon any defendant or defendants, and an appearance entered, or common bail filed for such defendant or defendants, by the plaintiff's attorney, pursuant to the act, the plaintiff's attorney in such case shall leave a copy of the declaration in the office with the proper officer appointed for that purpose, and also give notice thereof to the defendant or defendants, by delivering an English notice, written in secretary hand, to such defendant or defendants; or by leaving the same at the last or usual place of abode of such defendant or defendants, in which notice shall be likewise expressed the nature of the action, and at whose suit prosecuted, and the time limited by the rules of this court for such defendant or defendants to plead to such action; and that in case such defendant or defendants do not plead to such declaration by such limited time, so to be expressed in such notice, judgment shall be entered against such defendant or defendants by default, and from the time of giving such notice as aforesaid, such declaration shall be deemed well delivered to such defendant or defendants, and not otherwise; and in case such defendant or defendants, after such notice given, do not plead by the time the rules for pleading are out, the plaintiff in such case may sign his judgment without any other or further calling for a plea, and thereon give notice of executing his writ of inquiry, either by delivering a notice in writing to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants, which shall be a sufficient notice to such defendant or defendants of the time of executing such writ of inquiry.

As to delivering
the declaration
de bene esse.

As to delivering the declaration *de bene esse*, or by the bye, see sect. iv. of this title; and for the form of indorsement, see Nos. 2, 3, FORMS subjoined.

On the filing or delivering of the declaration give rule to plead, and in due time demand plea; but be cautious in demanding plea before bail perfected, as that is a waiver of justification. *Lister v. Wainhouse*, Bar. 92. See titles PLEA, Demand of Plea. RULE TO PLEAD.

VI. FORMS, K. B.

No. 1.
Indorsement on
declaration filed
in chief.

The defendant is to plead hereto in four days, (or in eight days, as the case may be, see pp. 440, 1, ante, as to its being a town cause, and as to the residence of the defendant) otherwise judgment. Dated this ——— day of ———, 182—

Filed conditionally until special bail is put in and perfected, and the defendant is to plead hereto in four days (or eight days, as the case may be, see page 441, *ante*, as to the town cause, and the residence of the defendant) otherwise judgment. Dated this _____ day of _____, 182—

No. 2.
Indorsement when declaration is filed *de bene esse*, action bailable.

Filed conditionally until common bail is filed (if by original, say "until an appearance is entered,") and the defendant is to plead hereto in eight days, otherwise judgment. Dated this _____ day of _____, 182—

No. 3.
The like, not bailable.

The defendant is to plead hereto within the first four days of next _____ term, otherwise judgment. Dated this _____ day of _____, 182—

No. 4.
Indorsement where the defendant is to plead the next term, or entitled to an imparlance.

[*Court.*]

[*Title cause.*]

Take notice, that a declaration was this day filed with the clerk of the declaration in the King's Bench Office, in the Inner Temple London, as of this present _____ term, against you*, at the suit of the above named plaintiff, in an action of trespass on the case, on several promises, [or "in an action of debt," or as the case may be,] to the plaintiff's damage of £—, and unless you plead thereto in four days (*or as the case may be, see the observations in the indorsement, No. 1.*) from the date hereof, judgment will be signed against you by default. Dated this _____ day of _____, 182—

No. 5.
Notice of declaration filed in chief, action bailable.
Assumpsit.

Your's, &c.

To Mr. _____, the _____, plaintiff's attorney.
above-named defendant.

Take notice [*&c. down to asterisk*, from No. 5, above. then proceed*] who hath survived G. H. at the suit of the above named plaintiff who hath survived E. F.

No. 6.
Form where one of plaintiffs or of defendants hath died between process and declaration.

[*Court.*]

[*Title cause.*]

Take notice, that a declaration was this day filed with the clerk of the declarations in the King's Bench Office, in the Inner Temple, London, conditionally until special bail is put in and perfected, as of this present _____ term, against you, at the suit of the above, named plaintiff, in an action of trespass on the case, on several promises, [or "in an action of debt," or as the case may be] to the plaintiff's damage of £—, and unless you plead thereto in four days (*or as the case may be, see observations in the indorsement, No. 1.*) from the date hereof, judgment will be signed against you by default. Dated this _____ day of _____, 182—

No. 7.
The like filed *de bene esse*, action bailable.

Your's, &c.

To Mr. _____, the _____, attorney for the plaintiff.
above-named defendant.

[*Court.*]

[*Title cause.*]

Take notice, that a declaration was this day filed with the clerk of the declarations in the King's Bench Office, in the Inner Temple, London, conditionally, until common bail be filed (if by original, "until an appearance be entered,") as of this present _____ term, against you, at the suit of the above-named plaintiff, in an action of trespass on the case, on several promises, [or "in action of debt," or as the case may be] to the plaintiff's damage of £—, and unless you plead thereto in eight days from the date hereof, judgment will

No. 8.
The like, not bailable.

DECLARATION; VI. FORMS; *Beginnings*, &c. K. B.

be signed against you by default. Dated the _____ day of _____, 182—

Your's, &c.

To, Mr. _____, the
above-named defendant. _____, attorney for the plaintiff.

Of entitling the
declaration,

The declaration should be entitled of the term in which the writ was returnable generally, unless the cause of action arose after the first day of that time; and then it should be entitled specially of a particular day in term after the cause of action arose, thus

Specially.

_____ next, after _____ in _____ term, in the _____ year of the reign of king George the Fourth.

No. 9.
Beginning of a
declaration in
assumpsit. By
bill K. B.

_____ term, in the _____ year of the reign of king George the Fourth.
Ellenborough and Markham.

(The chief clerks names.)

Venue *(in the margin)* to wit. A. B. complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself. For that whereas, &c.

No. 10.
Where defendant
is in custody of
the sheriff.

[Venue], to wit. A. B. complains of _____ being in the custody of the sheriff of the county of _____, by virtue of his majesty's writ of latitat [or special capias, as the case may be], For that whereas, &c.

No. 11.
Beginning of de-
claration in ac-
count.

Venue *(as before)*, to wit. A. B. complains of C. D. being, &c. *(as in No. 1.)* of a plea that he render to the said A. B. a reasonable account for the time he was bailiff to the said A. B. in the county of _____ (or receiver of the monies of the said A. B.) For that whereas, &c.

No. 12.
The like in an-
nuity.

Venue *(as before)*, to wit. A. B. complains of C. D. being, &c. *(as before)*, of a plea that he render to the said A. B. of a certain annuity or yearly rent of £_____, and which the said C. D. owes to the said A. B. For that whereas, &c.

No. 13.
The like in co-
venant.

Venue *(as before)*, to wit. A. B. complains of C. D. &c. *(as before)* of a plea of breach of covenant. For that whereas, &c.

No. 14.
The like in debt.

Venue *(as before)*, to wit. A. B. complains of C. D. &c. *(as before)* of a plea that he render to the said A. B. the sum of £_____ of good and lawful money of Great Britain, which he owes to and unjustly detains from him. For that whereas, &c.

N. *In actions by and against executors and administrators, the words "owes to and" in the last precedent, are omitted.*

No. 15.
The like in de-
tinue.

[Chief Clerks.]

[Term.]

Venue *(as before)*, to wit. A. B. complains of C. D. being, &c. *(as before)*, of a plea that he render to the said A. B. certain goods and chattels (or certain deeds and writings) to the value of £_____ of lawful money of Great Britain, which he owes to and unjustly detains from him. For that whereas, &c.

No. 16.
The like in tres-
pass.

[Chief Clerks.]

[Term.]

Venue *(as before)*, to wit. A. B. &c. as in case. For that *(leaving out the words of recital, whereas, &c.)*

[*Chief Clerks.*]

[*Term.*]

No. 17.

Venue (*as before*), to wit. A. B. complains of C. D. who was arrested, (or served with process) by the name of E. D. being in the custody (*as before*). For that whereas, (&c.)

Against a defendant arrested by a wrong name.

[*Chief Clerks.*]

[*Term.*]

No. 18.

Venue (*as before*), to wit. A. B. who sued out the process in this cause by the name of E. B. complains of C. D. being, &c. (*as before*) For that whereas, (&c.)

Where plaintiff sued out his writ by a wrong name.

FORMS OF CONCLUSIONS OF DECLARATIONS IN K. B.

_____ To the damage of the said A. B. of £_____ and therefore he brings suit, &c.

No. 19.
Common conclusion of a declaration in K. B.

Pledges to prosecute

{ John Doe,
and
Richard Roe.

_____ And other wrongs to the said A. B. then and there did, against the peace of our said lord the now king, and to the damage of the said A. B. of £_____ and therefore he brings suit, &c.

No. 20.
Conclusion of a declaration in trespass, K. B.

Pledges to prosecute

{ John Doe,
and
Richard Roe.

VII. CASES AS TO TIME FOR DECLARING, C. P.

See sect. iii. of this title.

The time for the plaintiff's declaring in this court is the same as that in K. B. and the rules and decisions of that court are generally applicable to the practice in this respect; except that in C. P. unless called upon by rule, plaintiff has till the essoign day of the third term to declare in, and the defendant cannot sign judgment for not declaring before the end of the second term after the writ is returnable, until he hath given the plaintiff a rule to declare, and this he must do at the end of the term after the return of the process, or in four days afterwards. *R. G. H. 9 Ann. Stewart v. Harding, 1^o R. 121.* and the declaration, previously to signing judgment, must also be demanded in writing, *2 R. G. M. 1 G. II. C. P.*

VIII. CASES AS TO DELIVERING AND FILING DECLARATION, C. P.

Most of the cases and decisions mentioned under the corresponding division, K. B. sect. iv. of this title, are applicable here. See PRACTICAL DIRECTIONS, C. P. subjoined.

By *R. H. 38 G. III. C. P.* upon all process sued out of this court, returnable the last return of any term if the plaintiff declare in London or Middlesex, and the defendant live within twenty miles of London, the defendant shall plead within four days after such declaration filed or delivered, with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered on the day of such return (or on the day next after such return in case the same shall not happen on a Sunday, in which case the plaintiff shall have the whole of the day following) to file or deliver such declaration as aforesaid. And in case the plaintiff

R. G. H. 35 G. III.

DECLARATION; VIII. *As to delivering and filing, &c. C. P.*

declare in any other county, or the defendant live above twenty miles from London, the defendant shall plead within eight days after the declaration filed or delivered, with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered as aforesaid. And the rules now in force respecting the times of declaring and pleading upon any process returnable the first, second, or third return of any term shall also extend to the fourth return of Easter term.

The above is a copy of the order verbatim, signed by the judges, taken from a copy in the possession of Mr. Secondary Griffith. In 2 *H. Bl.* 551. there is a copy of this rule; but there, instead of the passage above inserted between brackets, is the following, the result however being the same in both: (or on the day next after the same, unless such "return day shall happen on a Saturday, in which case the plaintiff shall have the whole of the Monday following"). In *Peacock's* collection of the *Rules and Orders of the Common Pleas*, the passage is (or on the day after such return, in case the same shall happen on a Sunday) which conveys a directly contrary meaning to that intended. In *Tidd's Practice*, 345, 5th edit. the rule is stated correctly.

De bene esse.

The rules of court mentioned sect. iv. *ante*, are nearly the same in C. P. at least they are not so different as to justify their being repeated here; but the *R. G. T.* 8 G. III. will be found under the *Practical Directions* subjoined, *post*.

Agreeably to which rule it has been decided, that the plaintiff may file his declaration on the last return of the term, or on the day after such return; and if that fall on Sunday then on the Monday, without entitling the defendant to an imparlance; and this rule applies as equally to Easter term as to any other. *Crew v. Attwood*, 2 *Marsh.* 337. *R. G. C. P. H.* 35 G. III.

The time of pleading in C. P. is the same as where plaintiff declares in chief, that is, four or eight days, according to its being a town or country cause, or the defendant's residence.

It has already been observed, that in K. B. the return day, that is, the first day of full term, is the soonest that a declaration can be delivered *de bene esse*; but in C. P. it will be recollected that the return day is earlier, i. e. the essoign day; and it has been determined that the declaration cannot be delivered *de bene esse*, so as to charge the defendant with paying for it till the appearance day of the return, which is the *quarto die post*, or the fourth day after the return day, the four days being considered as days of grace. *Golding v. Grace*, 2 *Bl. R.* 749. See also 2 *Bl. R.* 1243.

In C. P. if a declaration is delivered *de bene esse* on the essoign day of the return, defendant is entitled to eight days time to plead; if after the essoign day, and on or before the appearance day of the return of the writ, the defendant is entitled to four days from the appearance day; and if delivered after the appearance day then to four days after delivery. 2 *Bl. R.* 1243. and he must plead in eight days from the essoign day, although by the rules of the office no person is allowed to search for a declaration till the first day in full term. *Hutchinson v. Best*, 1 *Taunt.* 22.

In this court the practice materially differs from that in K. B. as to who may deliver a declaration by the bye. In K. B. any per-

son in certain cases may deliver a declaration by the bye; but in C. P. in *all* cases, no person can deliver by the bye, except the plaintiff himself. *Methwin v. Pople, Cas. Prac. C. P. 6.* *Holmes v. Small, id. 58.* and he must do it within the same term in which the writ is returnable. *Dunn v. Hutt, Bar. 346.* By the bye.

In *Methwin v. Pople*, just cited, it was determined that the defendant's attorney was bound to receive declarations by the bye at the suit of the same plaintiff, though not at the suit of others.

It is observed by Mr. Serjeant Sellon, 229, that the reason of this difference in the practice of the courts seems to be, that in *B. R.* when defendant is actually in court, either by having filed common bail, or by putting in special bail, he is presumed to be in the custody of the marshal, ready to answer all declarations that may be brought against him by any person whatsoever; whereas, in *C. B.* he is only in court *quoad* the plaintiff; but in the case next to be mentioned, it appears that the reason suggested was, that there was no process to warrant it.

It seems that in *C. P.* the same plaintiff only can deliver a declaration by the bye, for it was determined in *Reeks and Wife v. Robins*, that where *Reeks* only had issued a writ he could not declare by the bye at the suit of himself and wife. *Bar. 337.*

IX. PRACTICAL DIRECTIONS, C. P.

The office practice is generally the same as in K. B. mutatis mutandis.

The differences are as follow:

Whatever is directed to be done at the King's Bench office, or at the clerk of the rules; &c. must be done at the prothonotaries, or at the secondary offices, C. P.

If the defendant's attorney have appeared, or put in bail, the declaration must be delivered to him, [whereupon he must pay for the same duty and warrant; or on refusal by him or his clerk in his absence], or if his abode be unknown, it may be filed in the prothonotary's office, on payment of 2s. a count, or 8d. per sheet, and then on notice thereof to the defendant or his attorney (and from the time of giving such notice, and not before declaration is well delivered) and on rule to plead being given, judgment for want of a plea may be signed, and no plea may be received till the declaration is taken out of the office, R. G. T. 12 W. III.*

And if a defendant's place of abode be unknown, application must be made to the court, that affixing the declaration in the office may be deemed good service. Weller v. Robinson, 1 Taunt. 433.

The general rule as to appearance according, &c. seems to be nearly the same in both courts; see R. therefore K. B. page 442, ante, that of C. P. is also of T. 1 G. II. The only distinction between the rules seems to be, (1.) That in C. P. it is ordered, that the notice of declaration also signify in whose office the declaration is left, (2.) and that before judgment can be signed, a rule to plead must be first given.

Upon process, returnable the first, second, or third return of any term, the declaration may be delivered de bene esse, at the return of the process, with notice to plead if in London or Middlesex, and defendant

Plaintiff's appearing according to the statute.

Of delivering declaration de bene esse.

* This clause between brackets is superseded by the declaration and issue, money being now allowed in taxation.

DECLARATION; IX. PR. DI.; X. FORMS, C. P.

lives within twenty miles of London, in four days; but if the plaintiff declares in any other county, then it may be delivered de bene esse, with notice to plead within eight days after the declaration delivered, either where there is special or common bail filed. R. G. T. 8 G. III.

As to whether the declaration may be delivered on the last return, see the rule of court, R. G. T. 22 G. III. and the observations thereon, ante, page 437.

X. FORMS, C. P.

Under similar circumstances, the indorsement on the declaration is the same as in K. B. See FORMS, K. B. page 442, 3, ante, except that instead of "until common bail be filed," the indorsement will run, "until an appearance be entered."

The like observation is applicable to the notice of declaration, which only varies from that in K. B. in stating the court to be "in the Common Pleas," and instead of saying "filed with the clerk of the declarations in the King's Bench office," say, "with the prothonotaries, at their office, in Tanfield-court." See the several notices, Nos. 5, 6, 7, 8, under FORMS, K. B. page 443, ante.

And in declaring against a prisoner, the custody is not as in K. B. stated.

No. 1.
Beginning of a
declaration in
assumpsit or case,
C. P.

[Court.]

[Term.]

(Venue), to wit. C. D. was attached to answer A. B. and thereupon the said A. B. by E. F. his attorney, complains. For that whereas, (&c.)

No. 2.
The like in co-
venant.

[Court.]

[Term.]

(Venue), to wit. C. D. was summoned to answer A. B. of a plea, that he keep with him the covenant made by the said C. D. with the said A. B. according to the force, form, and effect of a certain indenture (or of a certain deed poll or articles of agreement) thereof made between them, &c.*, and thereupon the said A. B. by E. F. his attorney, complains. For that whereas, (&c.).

No. 3.
The like in debt,
&c.

In account, annuity, debt, and detinue, the defendant is said to be summoned to answer, and the plea is described as in K. B. by bill.

No. 4.
The like in re-
plevin.

[Court.]

[Term.]

(Venue), to wit. C. D. was summoned to answer unto A. B. of a plea, wherefore he took the cattle (or "goods and chattels") of the said A. B. and unjustly detained them, against sureties and pledges, until, &c. and thereupon, (&c.)

No. 5.
The like in tres-
pass.

[Court.]

[Term.]

(Venue), to wit. C. D. was attached to answer A. B. of a plea, wherefore the said C. D. with force and arms, &c. broke and entered (or "made an assault," &c. *recite the trespass at length, but without particularizing the time, number, quality, or value, &c.*) and other wrongs to the said A. B. then did, to the great damage of the said A. B. and against the peace of our lord the now king; and thereupon the said A. B. by E. F. his attorney, complains that the said C. D. on (&c. *repeating the trespasses, with the circle of time, quantity, quality, value, &c.*) and other wrongs, to the said A. B. then and there did, to the great damage of the said A. B. and against the peace of our said lord the now king, (&c.)

* A description of the action in the preamble seems quite unnecessary.

Wherefore the said A. B. saith that he is injured, and hath sustained damage to the value of £—— and therefore he brings his suit, &c.

To the damage of the said A. B. who sues as aforesaid of £—— and therefore, as well for our said lord the king (or for the poor of the parish of ——) as for himself in this behalf, he brings suit, &c.

No. 6.

Common conclusion to a declaration, C. P.

No. 7.

The like in *qui tam*.

XI. GENERAL FORMS.

OF COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS NOT INCLUDED UNDER ANY OTHER HEAD, ARRANGED ALPHABETICALLY.

[Court.]

(Venue), to wit. E. F. was attached to answer to A. and B. assignees of the estates of C. D. a bankrupt, according to the force, form, and effect of the several statutes concerning bankrupts, of a plea of trespass on the case, &c.: And thereupon the said A. and B. assignees as aforesaid, by G. H. their attorney, complains. That whereas, &c.

[Term.]

No. 1.

Beginning of a declaration at the suit of an administrator, see p. 450, *Executor*, Form, No. 10.

No. 2.

Beginning of a declaration at the suit of assignees in C. P.

[Chief Clerks.]

(Venue), to wit. A. B. assignee of the estate, debts, and effects of C. D. late of ——, heretofore an insolvent debtor (or fugitive) and duly discharged from imprisonment, in pursuance of an act of parliament made at Westminster, in the county of Middlesex, in the —— year of the reign of his present majesty, intituled, an act (*state title*) complains of E. F. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself. For that whereas, (&c.)

[Term.]

No. 3.

Beginning of declaration by assignees of an insolvent debtor or fugitive, K. B.

In C. P. the form is varied, as in the case of an assignee of a bankrupt.

[Chief Clerks.]

(Venue), to wit. A. B. assignee of the goods, debts, and effects of C. D. late of ——, heretofore an insolvent prisoner, and duly discharged from imprisonment in pursuance of certain acts of parliament made for the relief of insolvent debtors, complains of E. F. being (*as in the last precedent*). For that whereas, &c.

[Term.]

No. 4.

The like where the debtor was discharged under the lord's act, K. B.

[Chief Clerks.]

(Venue), to wit. A. B. C. D. and E. F. assignees of the estate and effects of G. H. heretofore an insolvent debtor, and duly discharged from imprisonment in pursuance of an act of parliament made at Westminster, in the county of Middlesex, in the —— year of the reign of his present majesty, intituled an act ——, complain of J. K. being, &c. (*as before*). For that whereas, (&c.)

[Term.]

No. 5.

The like where discharged under another act.

[Chief Clerks.]

(Venue), to wit. A. B. and C. his wife, complain of D. E. and F. his wife, being in the custody of the marshal (&c. *as before*). For that whereas, (&c.)

[Term.]

No. 6.

Beginning of declaration by and against baron and feme, K. B.

[Chief Clerks.]

(Venue), to wit. ——, clerk to trustees for putting in execution a certain act of parliament, made and passed in the —— year of the reign of his present majesty, intituled, an act for (*title*) accord-

[Term.]

No. 7.

Beginning of a declaration against a clerk, under trustees

DECLARATION; XI. GENERAL FORMS, &c.

appointed by act of parliament, &c. ing to the form and effect of the said act of parliament, was attached to answer (&c. *this declaration was continued against the trustees*).

No. 8. [Chief Clerks.] [Term.]
The like against a corporation. (Venue), to wit. The dean and chapter of the cathedral church of the Holy Trinity of Bristol, were summoned to answer A. B. of a plea, (&c.) call defendants afterwards "the said dean and chapter."

N. Assumpsit will not lie against a lay corporation.

No. 9. [Term.]
Another. In the King's Bench, (or *Common Pleas*). (Venue), to wit. The mayor, commonalty, and citizens of the city of London, were attached (or *summoned*) to answer A. B. of a plea of trespass in the case (or *as the plea is*); and thereupon the said A. B. by _____ his attorney, complains. That whereas the said mayor, commonalty, and citizens, (&c.)

No. 10. [Chief Clerks.] [Term.]
Beginning of a declaration at the suit of an executor in debt. Venue (*as before*), to wit. _____, executor of the last will and testament of _____, deceased, (or if administrator, say, "administrator, of") complains of _____, being, &c. (*as before*) of a plea that he render to the said _____, as executor (or as administrator) as aforesaid, the sum of £_____ of good and lawful money of Great Britain, which he unjustly detains from him. For, &c.

No. 11. [Chief Clerks.] [Term.]
The like in debt at the suit of a common informer. A. B. who sues as well for our sovereign lord the king (or, "for the poor of the parish of _____, in the county of _____") as for himself in this behalf, complains of C. D. &c. (*as before*) of a plea that he render to our said lord the king (or to the poor of the parish of _____) and to the said A. B. who sues as aforesaid, the sum of £_____ of lawful money of Great Britain, which he owes to and unjustly detains from them. For that whereas, &c.

No. 12.
Conclusion of a declaration in K. B. *q. t. qui tam* (or at the suit of an informer.) _____ To the damage of the said A. B. who sues as aforesaid, of £_____ and therefore as well for our said lord the king (or for the poor of the parish of _____) as for himself, in this behalf he brings his suit, &c.

Pledges to prosecute { John Doe,
and
Richard Roe.

No. 13. [Chief Clerks.] [Term.]
Beginning of a declaration at the suit of the king in K. B. (Venue), to wit. His most sacred majesty king George the Fourth, by the grace of God of the united kingdom of Great Britain and Ireland king, defender of the faith, complains of, (&c.) For that whereas (&c. denominating the king "his said majesty"—*no pledges*)

No. 14. [Chief Clerks.] [Term.]
Beginning of a declaration by one partner, and assignees of another, in K. B. (Venue), to wit. A. B. and C. the said B. and C. being assignees, (as in precedent, No. 2. page 449, *ante*) complain of E. F. being in the custody of the marshal of the Marshalsea of, (&c.) For that whereas, (&c.)

No. 15. [Chief Clerks.] [Term.]
The like at the suit of the queen in K. B. (Venue), to wit. Her most sacred majesty _____, queen of the united kingdom of Great Britain and Ireland, consort of our sovereign lord the now king, complains of C. D. being in the custody, (&c.) For that whereas, (&c. denominating the queen "her said majesty.")

DEDIMUS POTESTATEM. See titles FINE. RECOVERY.

DEEDS. See titles OYER. SUBPENA.

DEFAULT. See title JUDGMENT BY DEFAULT.

DEFEASANCE, *Defeasance on Warrant of Attorney.*

A collateral instrument containing a condition; usually made at the same time with the warrant of attorney; which condition, when performed, defeats its force. What.

But an obligation, &c. may be defeated by a defeasance made after the condition is broken as well as before. *Ayloff v. Scrimshire*, *Carth.* 64. 2 *Saund.* 47. n.

In K. B. by *R. G. M.* 42 G. III. 2 *East*, 136; in C. P. by *R. G. M.* 43 G. III. 3 B. & P. 310. "every attorney who shall prepare any warrant of attorney to confess any judgment, which is to be subject to any defeasance, shall cause such defeasance to be written on the same paper or parchment, on which the warrant of attorney shall be written; or cause a memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeasance." Rules K. B. and C. P. respecting defeasance.

When indorsed on the warrant of attorney, it does not require a separate stamp. *Cawthorne v. Holben*, 1 *N. R.* 279.

See title WARRANT OF ATTORNEY.

FORM.

Memorandum. The within warrant of attorney is given to secure payment by the within-named _____ to the within-named _____, of the sum of £_____ and interest, on the days and in manner following, that is to say, the sum of £_____ one moiety (or part) thereof, together with interest for the same (or as the case may be) on the _____ day of _____ next ensuing the date hereof, and the sum of £_____ the other moiety (or remaining part or residue) thereof, together with interest for the same, on the _____ day of _____, which will be in the year of our lord, 182—: And it is hereby declared and agreed by and between the said parties, that no action, process, execution, or other proceedings, shall be commenced, sued, or prosecuted against the said _____ his heirs, executors, or administrators, or against his lands, tenements, goods, and chattels, upon the judgment to be entered up in pursuance of the within warrant, until default shall be made in payment, and satisfaction thereof. Witness our hands the day and year within written. Common defeasance on a warrant of attorney.

Witness.

(Witnesses names.)

(Parties Signatures.)

DEFENCE.

The practical act or means of opposing or resisting the plaintiff's demand. What.

Very nice distinctions as to full defence and half defence, as implied in the use of the phrase "when, &c." in certain cases, have been attempted to be made; but it has been decided that in general the "&c." would imply only the half defence in cases where such a defence was to be made, and that it would be understood as making a full defence, if a full defence were necessary. *Wilkes v. Williams*, 8 *T. R.* 631. 3. See also *Alexander v. Mawman*, *Willes*, 40. The case of *Gawen v. Surby*, 1 *Lutw.* 5.

appointed by act of parliament, &c.

ing to the form and effect of the said act of parliament to answer (&c. *this declaration was continued*

location of judgment in "priority," and that that case

No. 8.

The like against a corporation.

[Chief Clerks.]

(Venue), to wit. The dean and chapter of the Holy Trinity of Bristol, were summoned, (&c.) call defendants afterward.

N. Assumpsit will not lie

may be unable or very often is, de- or final judgment. it may be useful to head, not only the decisions respecting delay.

No. 9.

Another.

In the King's Bench, (or Common Pleas), to wit. The mayor of London, were attached (or trespass in the case (or as to) by his attorney, commonalty, and citizen.

in two terms after the return on judgment of *non pros*; but if the plaintiff may declare any time after, 1 T. R. 112. Penny v. Harvey,

No. 10.

Beginning of a declaration at the suit of an executor in debt.

[Chief Clerks.]

Venue (as before)

testament of (nistrator, of") plea that he re (trator) as afo Great Brit

no step in the cause for three terms, and in concilium and obtain judgment in the fifth term, concilium is taking a step in the cause so-as to make a term's notice. Bland v. Darley, 3 T. R.

No. 11.

The like in debt at the suit of a common informer.

[Chief Clerks.]

A. P.

the

as

p

in the same case it was decided; that the rule requiring a term's notice, after a delay of four terms, is to prevent surprize on the defendant, and therefore does not apply where the proceedings have delayed at the defendant's request.

No.

Conclusi-
declara-
K. B.
(or a'
an i

How far it should yet be in the power of a plaintiff or defendant, without especial, not nominal leave of the court, to delay proceeding, or to defeat for a time the due prosecution of a suit, is a question worthy of grave consideration. That hasty justice is not always measured with a just hand, may not, I think, admit of being doubted; but that the law should allow impediments to be cast in the way of a just claimant, seems to be an anomaly in legal science scarcely compatible with any legal principle or even common sense. It is true that, practically, an opinion is entertained, that by the additional expence to which a party seeking to defeat another by delay is put, sufficient punishment is inflicted. Yet, although the defendant be punished, as alleged, it should be recollected that the plaintiff is not benefitted by what the defendant suffers. In every case of right withheld, he who is wronged should be compensated at his expence who does the wrong. But, in the case of delay, officers who minister the fictitious means of delay, are chiefly advantaged. And why, it may with all deference also be asked, should a party reckless of consequence to himself, have it in his power, under sanction of law, to inflict a wrong upon another? And that delay by sham pleading, writ of sham

errors, &c. &c. does inflict substantive injury upon one party is too clear to admit of doubt, and too bad to admit of justification. I desire to speak, and write, with deference, of ancient things; but when ancient things lose their pertinency, or become perverted to bad ends, it is time for courts and legislature to go hand in hand in timely and useful revision of ancient things, which, however proper in their origin, are no longer so. It is the first time, I believe, that ever the details of "delay" found their way into a book of practice; but I have little hesitated to insert and extend the title. The evil thus, as it were, *subjectis oculis*, will be better appreciated, and some means more rational may perhaps be found for giving time to parties requiring it, than those which are here presented. Gross falsehoods, and the more gross, when injurious, ought not, under any pretence, to be made subservient to the gratification of bad passions, or to the emolument of particular men.

It is my earnest hope, that those who officially derive emolument from these obnoxious things, will not impute invidiousness to my freedom of observation. If what they enjoy, the law have too long sanctioned, no just law can now take it away without making the loser most ample compensation.

STATEMENT. DEFENCE.
The First Record.

proceedings having been had for above a year, the plaintiff, before Hilary Term, gave notice of his intention to pro-days after the term he served rule to plead, and in the judgment, as of Hilary Term, was signed for want regular. *Milbourne v. Nixon*, 2 T. R. 40.

this case, seems to have over-ruled an objection, cannot be given in vacation.

DECLARATION.

comes a question with practitioners in what plaintiff from obtaining judgment in a term; been had to various devices: it becomes to observe upon some of those the name of sham pleas, a title which I indulge a hope, will one day be expunged except in Easter term, it seems that a sham plea of bailable process in country causes prevent the obtaining judgment in the term his writ is returnable; although it be returnable the first return of the term. The observation will hold good as to where the declaration is delivered conditionally, and where the defendant has eight days to appear to common process. But in actions upon bills or notes a reference to the master to compute takes place, and thus the plaintiff obtains judgment as of the term. But in the case of proceeding against an attorney, who by the rules of the court must plead within the last four days of term, *e. g.* Hilary; it seems difficult to prevent, by means of a sham plea, the final judgment, as of the term being signed. For instance, the rule to plead being given in this case on the 23d, expired the 28th, when a plea, that a bond was given in satisfaction of the debt is filed. On the 29th, in the morning the plaintiff bespeaks a copy of the plea, and on the same day replies, that no such bond was given, and concludes to the country. The replication is filed and paper book is bespoke; the clerk of the papers adding the rejoinder. On the 30th, if that day be not on a Sunday, and if it be, on the 31st [1814] the paper book is delivered, with notice of trial for the last sitting in term. But the paper book is to be returned in four days, the last of these, according to whether the delivery be on the 30th or 31st, expiring on the 3d or 4th of February. On the 4th say, strike out the rejoinder added by the clerk of the papers, file a demurrer to the replication, and return the paper book. On the 5th, the plaintiff procures the demurrer and rejoinder to be added to the paper book, on which a new rule is given, expiring on the 6th, twenty-four hours only being allowed for the return. But it is not returned, and the plaintiff signs interlocutory judgment, still as his writ of inquiry cannot be returnable before Easter term, he is too late on the 6th or 7th to obtain judgment in Hil. term. Yet, as above observed, in actions upon bills and notes, it is different. In such actions, instead of writ of inquiry a motion is made for a rule to shew cause why it should not be referred to the master to compute, &c. On his *allocatur* the plaintiff signs judgment as of this term, and unless the allowance of a writ of error be served in due time, execution is levied. If the demurrer be argued, there are still five days good, on which one or more paper days will occur, and the

DELAY. DEMURRER.

plaintiff equally obtains judgment by procuring the reference to the master above-mentioned.

Upon delay effected by means of the writ of error, some observations will be made under title ERROR; a title which, unless entertained for real purposes of strict justice, it were well were it altogether swept from practice. And should this book yet reach another edition, its Editor well hopes he will have to add a note congratulatory of the public, and still more so of the profession, with relation to some modification of error, as with pleasure he has added when treating the title COUNTY COURT or COSTS.

DEMAND, *Demand of Copy of Warrant*, see title CONSTABLE. *Demand of Declaration*, see title DECLARATION. *Demand of Plea*, see title PLEA. *Demand of Plea. Demand of Replication*, see title REPLICATION. *Demand of Money on Award*, see title ARBITRATION. *Demand of Costs*, see title COSTS.

DEMISE. *Death or Demise of the King*.

The statute 1 E. VI. c. 7. enacts, that "by the death or demise of the king's majesty, any action, suit, bill, or plaint, that shall depend between party and party, in any of the courts, shall not in anywise be discontinued, or put without day, but that the process, pleas, demurrers, and continuances, in every action, actions, suits, bills, or plaints, shall stand good and effectual, and be prosecuted and sued forth in such manner and form, and in the same estate, condition, and order, as if the same king had lived or continued in full life, the death or demise hereafter of any king of this realm notwithstanding; and that all and all manner of judicial process that shall be had or pursued in the time of the reign of any other king, then reigning, at the time of the pursuit of the original or former process, shall be made in the name of the king that for the time shall reign and be king of this realm, and that variance, touching the same process between the names of the kings, shall not be in anywise material, as concerning any default to be alleged or object therefore." And by the 1 Ann. stat. 1. c. 8. s. 4. it is enacted, "that no writ, plea, or process, or any other proceeding upon any indictment or information for any offence, or misdemeanor, or any writ, process, or proceeding for any debt or account that shall be due, or to be made to her majesty, her heirs or successors, for or concerning any lands, tenements, or other revenue, that shall belong to her or them, that shall be depending at the time of her majesty's demise or of any of her heirs or successors, shall be discontinued or put without day, by reason of her or any of their deaths or demises; but shall continue and remain in full force and virtue to be proceeded upon notwithstanding any such death or demise."

DEMISE, *In Ejectment*. See title EJECTMENT.

DEMURRER.

What.

A form in pleading, by which a cause is stayed in its progress towards a termination by the country or a jury, on matter of fact, and judgment is thereby referred to the court on matter of law.

The intention of the institution of a suit is to obtain a judgment on the facts; but either party may admit certain facts, and yet al-

lege their insufficiency, as stated in the pleadings, to maintain the judgment prayed for by either party. This allegation is called a demurrer, from *demurrer*, a stop or impediment, and the court, instead of a jury, are called upon to pronounce what the law is upon the facts, so admitted by the demurrer; and the demurrer thus becomes an issue at law. See 3 *Comm.* 314.

But it should also seem that demurrer lies independently of facts; for where facts may themselves be sufficient for the maintenance of the suit, yet an informality may occur in stating or even omitting them, and, upon such informality, demurrer will hold.

A demurrer is either special or general.

Statute 27 *Eliz. c. 5. s. 1*, enacts, "that after demurrer joined, the judges shall proceed and give judgment, according as the right shall appear, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding, except those only which the party demurring shall specially and particularly set down and express with his demurrer; and that upon such demurrer joined and entered, the court shall amend all such imperfections, defects, and wants of form, other than those which the party demurring shall specially and particularly set down and express with his demurrer."

The law of demurrer generally. Stat. 27 *Eliz. c. 5.*

Mr. Crompton observes, that this statute in great measure was restorative of the common law, and required, in all cases of form, a special demurrer; but a general demurrer still sufficed for all matters of substance.

This statute restores the common law.

But matter once deemed of substance, is now considered matter of form only, and by several statutes, called of jeofails, particularly stat. 16 & 17 *C. II. c. 8.* such matter is aided unless specially demurred to, and what matter thenceforth deemed of substance, was thenceforth to be deemed matter of form, was pointed out by stat. 4 & 5 *Ann. c. 16*, which enacts, that no exception shall be taken of the following matters on a general demurrer, viz. an immaterial traverse, default of entering pledges upon any bill or declaration, default of alleging of bringing into court any bond, bill, indenture, or other deed mentioned in the declaration or pleading; default of alleging of the bringing into court letters testamentary, or letters of administration, the omission of *vi et armis*, or *contra pacem*, or either of them, or the want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*, or for not alleging *prout patet per recordum*, or matters of the like nature.

As to substantial and formal matter. Statutes 16 & 17 *Car. II. c. 8.* 4 & 5 *Ann. c. 16.*

As to these defects, therefore, special demurrer only will lie; likewise departure in pleading, though not specified in the above statute; but it is clear the legislature intended it should be included in demurrer to formal matter, and duplicity is still aided in a general demurrer.

Where special demurrer.

If on special demurrer defect of form be alleged, no advantage can be taken of any other defect of form than what is set down for cause of demurrer; but it may of matter of substance.

For this reason in general in practice it is deemed safest in all cases to demur specially. See 1 *Saund.* 337, b. (3).

Safest to demur specially.

The defendant cannot waive a general demurrer to the declaration; but he may waive a special one after the book is made up,

Waiver of demurrer.

Where declaration contains many counts.

General demurrer to pleading as a whole.

Where counts improperly joined.

Where *nol. pros.* refused.

What considered as judgment by default.

Demurrer when under terms.

Where after judgment on demurrer to pleas, judgment of nonsuit awarded.

Judgments on demurrer in abatement.

unless the defendant has been previously ruled, and he hath elected to abide by it.

If there be three counts to the declaration to which there is a general demurrer, and any one of the counts be good, judgment must be for the plaintiff, if such count can be joined with the other two. *The Duke of Bedford v. Alcock*, 1 *Wils.* 252; but where the pleading to which there shall have been demurrer be a whole, and part be bad, the whole is bad; thus a replication, when entire, which is bad as to part, is bad as to the whole. *Webber v. Tyvill*, 2 *Saund.* 124; but the rule cannot apply to any case where the objection is merely on account of surplusage. *Buller, J. Duffield v. Scott*, 3 *T. R.* 374.

Where the cause of demurrer to a declaration was, that the counts were improperly joined, C. P. held that the plaintiff could not enter a *nolle prosequi* as to some, and leave the others remaining. *Rose and Ux v. Bowler and al.* 1 *H. Bl.* 108.

So, after demurrer to a declaration of two counts, against two defendants, because one of them was not named in the last count, K. B. held, that the plaintiff could not enter a *nolle prosequi* on that count, and proceed on the other. *Drummond v. Dorant*, 4 *T. R.* 360.

Semble, that judgment on a general demurrer to a plea in bar, the matter of which, even if well pleaded, would be no defence to the action, is to be considered as a judgment by default. *Barney v. Tubb*, 2 *H. Bl.* 350.

A demurrer for misjoinder or other substantial cause, (going to the substance of the whole declaration, or cause of action) is a good plea within the meaning of a judge's order for pleading issuably. 1 *Chit. R.* 711.

It is said, that the defendant cannot put in a special demurrer when he is under terms of pleading issuably. *Berry v. Anderson*, 7 *T. R.* 530. *Tamen quare*, whether a special demurrer, if a fair one, be not an issuable plea, within the meaning of a judge's order. See *Dewey v. Sopp*, 2 *Str.* 1185. *Stonehouse v. Powell*, *Sey. R.* 88. *Grey v. Ashton*, 3 *Burr.* 1788. *Wright v. Russell*, 2 *Bl. R.* 923. But it is now ruled in C. P. that a defendant under terms of pleading issuably, cannot assign special causes of demurrer, even though the causes assigned be matter of substance. *Blick v. Dymoke*, 1 *Bing.* 379.

Of course, therefore, a frivolous demurrer is not within such an order. See *Cuming v. Sharland*, one, &c. 1 *East*, 411.

After judgment for the defendant on demurrers to certain special pleas, there may be judgment of nonsuit, against the plaintiff for not proceeding to trial on other general pleas on which issues were joined. *Paxton v. Popham*, 10 *East*, 366.

The judgment on a demurrer to a plea in abatement is not final, but only a *respondeat oster*. *Eichorn v. La Maitre*, 2 *Wils.* 368.

What is, and what is not subject-matter of demurrer, may not fully be treated here; the foregoing Acts of Parliament, observations, and cases, will have assisted in drawing a line, and few practitioners will of themselves choose to see to the particular application. See titles DECLARATION. NOLLE PROSEQUI. PAPER-BOOK. PLEA. PLEADING.

PRACTICAL DIRECTIONS.

All pleadings require to be settled with great attention ; therefore the practitioner in general submits them to careful examination. Pleadings require care.

A general or special demurrer is drawn ; and afterwards engrossed. How engrossed, signed, &c.

See the PRACTICAL DIRECTIONS as to preparing the declaration.

All demurrers must be signed by counsel; fee 10s. 6d. *Douglass v. Child*, E. 33 G. III. C. P. 2 Tidd, 727. If general, the demurrer is to be delivered to the opposite attorney. *Metz v. Brown*, H. 57 G. III. MS. *Rowell v. Cox*, 1 Chit. R. 211. S. P. When delivered.

If special, or general, after special plea pleaded, it is filed in the office of the clerk of the papers. When filed.

But general demurrer to part of a declaration, and plea of the general issue to the other part, must be delivered to the plaintiff's attorney, and not filed with the clerk of the papers, otherwise a nullity. *Dymock v. Stevens*, 3 D. & R. 248.

If the demurrer be general, the subsequent steps are these, viz. The party joins in demurrer, and proceeds to make up the demurrer book, but if there be reason to believe that the demurrer is merely for delay, a rule may be obtained and served, calling on him to abide thereby, or to plead another on the morrow or instanter. See title ABIDING BY PLEA, page 7, ante. Joinder in demurrer. Rule to abide.

If the proceeding is by bill, commence the demurrer book with a memorandum, (FORM, No. 4.) of the term demurrer is joined; copy the whole of the declaration; add the demurrer on a new line, and conclude the demurrer book with the joinder in demurrer, deliver the whole to the defendant's attorney. (FORM, No. 5.) Demurrer book by bill.

If the demurrer be special, the clerk of the papers makes up the demurrer book; in order to do this, the plaintiff's attorney supplies him with a close copy of the declaration on unstamped paper; the book is made up expeditiously, according to exigency, and for this, as being out of course, a trifling gratuity, called expedition money, is given. The clerk of the papers gives a four-day rule in the margin of the paper book, to receive and return the same. Deliver the demurrer book to the defendant's attorney. If returned in time, proceed to argument. Where clerk of the papers makes up demurrer book. Rule thereon to return same.

If there be any variance in the paper book from the pleadings delivered, or other irregularity in making it up, the defendant's attorney or agent, instead of accepting it, should take out a summons, &c. for setting it right; as he cannot otherwise take advantage of the irregularity on a motion in arrest of judgment or for a new trial. 2 Tidd, 668, 9.

If not returned in time, sign judgment; if duly returned, and none of the pleadings struck out, move for a concilium. See title CONCILIUM, ante. If not returned, sign judgment.

A special demurrer may be waived, and a general demurrer returned, but a general demurrer cannot be waived. R. T. 5 & 6 G. II. (b). *Weld v. Nedham*, 1 Wils. 29. What demurrer waived.

Having obtained the Concilium, the clerk of the papers enters the demurrer for argument, agreeably to the following. R. G. M. 30 G. II.

Ordered, that all special causes to be set down by the clerk of the papers shall be entered at least four days, exclusive of the day of argument, of which notice shall forthwith be given to the attorney or agent on the other side, and to be argued in the order the same stand entered, and shall not be adjourned; unless the court for reasonable cause, verified by affidavit, upon application to be made by either of the said parties, their attorney, or agent, at least two days before the argument otherwise order; that all such causes remaining undetermined at the end of any term R. M. 30 G. II.

enter the demurrer on record; but this alternative is not the practice at this day; for if the plaintiff doth not duly comply with the master's rule, the defendant may sign judgment. Rules and Orders, K. B. 177.

Mr. Serjeant Sellon suggests a quære; whether, on the plaintiff's neglecting to enter the demurrer on the record, the defendant may not sign judgment, and adds, "but if he wishes to have demurrer argued, then let him make up paper book, and get a rule of the master, which he gives on the book, or on a detached piece of paper."

Where plaintiff declines joining in demurrer.

On the plaintiff's declining to join in demurrer, apply to the master for a rule to compel him. This being given on the back of the demurrer, is to be entered with the clerk of the rules; pay 2s. 10d.; serve copy on the plaintiff's attorney. If joinder in demurrer shall not have been delivered or filed at the expiration of the time mentioned on the rule, sign judgment of non pros.

Where joinder delivered, or filed.

If the demurrer be general, the joinder must be delivered; if special, it must be filed.

Where demurrer is to part, and issue to the country as to other part.

Where there is a demurrer to part, and the defendant hath pleaded to issue to the country as to other part, it is optional with the plaintiff, whether to proceed to argue the demurrer, or to try the issue on the facts by the country form. If to argue the issue at law be preferred, as is always most advisable it should, the proceedings go on as above-mentioned, without any relation to the issue to the country.

Some of the reasons for arguing the demurrer or issue at law first are, where the demurrer is first argued before any trial of the issues, the court will give leave to amend. *Giddins v. Giddins*, Say, 316, but not after verdict upon facts and contingent damages found upon the demurrer. *Robinson v. Rayley*, 1 Burr. 322.

The good sense of the following reasons for first trying the issue at law, as well as the legal soundness, is apparent.

"First, That the determination of an issue in law is generally more expeditious and less expensive than the trial of an issue in fact. Secondly, that if the issue in law go to the whole cause of action, and be determined against the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact; whereas, if the issue in fact be first tried and found for the plaintiff, he must still proceed to the determination of the issue in law; and, if that be found against him, he will not be allowed his costs of the trial of the issue in fact. And lastly, that whether the demurrer go to the whole, or part of the cause of action, if the plaintiff proceed to argue it first, and the court are of opinion against him, he may amend, as at common law; but after the cause has been carried down to trial, he cannot amend any farther than is allowable by the statute of amendments."

As to contingent damages.

To which it might have been added, that when the plaintiff is non-suited on the trial of an issue, he cannot have contingent damages assessed for him on a demurrer. *Snow v. Como*, 1 Str. 507.

See titles CONTINGENT DAMAGES. ISSUE. JUDGMENT.

FORMS.

No. 1.
General demurrer to declaration.

(Court.)

(Term.)

And the said _____, by _____, his attorney, at the suit of _____ comes and defends the wrong and injury, when, &c. and _____ says, that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said _____ to have or maintain his aforesaid action thereof against the said _____, to which

said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, the said _____ is not under any necessity, nor in anywise bound by the law of the land to answer, and this he is ready to verify; wherefore, for want of a sufficient declaration in his behalf, the said _____ prays judgment, and that the said _____ may be barred from having or maintaining his aforesaid action thereof against him, &c.

(Counsel's name.)

(Copy the above precedent to the end, and add) And for causes of demurrer in law to the said declaration, the said _____, according to the form of the statute in such case made and provided, sets down and shews to the court here the causes following, that is to say, (state such causes, and conclude with) And also for that the said declaration is in other respects informal and insufficient, &c.

(Counsel's name.)

No. 2.
Special demurrer to declaration.

(Court.) And the said _____, as to the said plea of the said _____ against _____, by him above pleaded, saith, that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said _____ from having or maintaining his aforesaid action thereof against the said _____, and that the said _____ is not bound by the law of the land to answer the same: And this the said _____ (plaintiff), is ready to verify; wherefore, for want of a sufficient plea in this behalf, the said _____ (plaintiff), prays judgment, and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

(Counsel's name.)

No. 3.
General demurrer to plea in assumpsit.

(Term.) Middlesex, to wit." Be it remembered, that on _____ next after _____ (the first day of the term), in this same term, before our lord the king at Westminster, comes _____, by _____, his attorney, and brings into the court of our said lord the king, before the king himself now here, his certain bill against _____, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case; and there are pledges for the prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit. Middlesex, to wit, (copy the declaration, and conclude with) suit, &c.

No. 4.
Memorandum prefixed to general demurrer book. By bill.

(Court.) And the said _____ saith, that the said declaration, and _____ against _____ the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for the said _____ to have and maintain his aforesaid action thereof against the said _____ (defendant); and the said _____ (plaintiff), is ready to verify and prove the same as the court here shall direct and award; wherefore, inasmuch as the said _____ (defendant) hath not answered the said declaration, nor hitherto, in any manner denied the same, the said _____ (plaintiff), prays judgment and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

No. 5.
Joinder in demurrer.

No. 6.
Conclusion of a
demurrer book.

But because the court of our said lord the king, now here, is not yet advised what judgment to give, of and concerning the premises, a day is therefore given to the said parties, that they be before our lord the king, at Westminster, on _____ next after _____, (if by original, say, "on _____ wheresoever," &c.) to hear their judgment thereon; for that the court of our said lord the king now here, is not yet advised thereof, &c.

No. 7.
Notice of having
struck out a
pleading.

(Court).

_____ v. _____

SIR,

I have struck out the rejoinder, and left in the office a demurrer to the plaintiff's application.

Your's, &c.

To Mr. _____, _____, defendant's attorney.
plaintiff's attorney.

PRACTICAL DIRECTIONS, C. P.

Demurrer engrossed, &c.

See PRACTICAL DIRECTIONS, K. B. above.

The demurrer must be signed by a serjeant, fee 10s. 6d.; it may be filed with the prothonotaries, or delivered to the attorney; if filed, pay 2s.

Who makes up demurrer book.

When the demurrer is joined, the plaintiff's attorney makes up and delivers to the defendant's attorney the demurrer-book, engrossed on 4d. stamped paper, and this contains the declaration, demurrer, and joinder. Judgment cannot now be signed in case of non-payment for demurrer-book. R. G. H. 35 G. III.

Then preparatory to moving for a concilium, proceed to enter the whole of the proceedings on the roll; move for the concilium.

Delivery of copies, &c.

See title CONCILIUM.

The concilium being obtained, deliver copies of the demurrer-book to the lord chief justice and the other judges. And if each party takes objections to the pleadings of the other, it is the duty of each to deliver paper books, with the points intended to be made on both sides stated in the margin. *Clarke v. Davies*, 7 Taunt. 73.

R. T. 17 & 18
G. II.

The counsel's names who signed the pleadings must appear, and on the outside of the books set down the number roll, and day of argument. Per Cur. 17 & 18 G. II. Bar. 164.

R. 49 G. III.

By R. 49 G. III. the demurrer-books must be delivered two days exclusive of the day of such delivery, before the day on which the same shall have been set down for trial; pay 2s. each.

Days argument.

And by R. 47 G. III. all special arguments on demurrers, and other special arguments to be heard on the day next before the sitting day at nisi prius, in Middlesex, and the day next after the sitting day at nisi prius in London, and on no other days.

Sham demurrer.

It is said, Imp. C. P. 290, "If a sham demurrer be delivered nearly at the end of the term, the court will, when you move for a concilium, give you the last day of term to argue the same; but this must be mentioned particularly by the serjeant."

Rule for judgment, &c.
Where interlocutory.

The rule for judgment on the demurrer is drawn up by the secondary; and if the judgment be interlocutory, the same may be immediately signed with the prothonotaries, having first been entered on 4d. stamped paper, and marked by the clerk of the warrants, as usual on signing interlocutory judgment. This done, give notice of executing the writ of inquiry, or move to refer it to the prothonotary to compute money due for principal and interest on a bill or note, and proceed to final judgment as in other cases.

If the judgment be final, obtain the rule as before, and sign judgment with the prothonotary; pay 6s. 4d. tax costs, and issue execution. See title JUDGMENT, signing final judgment. Where final.

But if a demurrer-book, of course containing a joinder in demurrer, be not delivered by the plaintiff's attorney, a (four-day) rule may be given at the secondaries office to compel him to join in demurrer; pay 2s. 10d.; previously to the expiration of the rule, the joinder in demurrer must be demanded in writing. On compliance with this, a rule to enter the issue may be obtained at the same office; this also expires in four days; serve copy on the plaintiff's attorney. On compliance with this also, either party may immediately move for a concilium. On non-compliance with either of these rules, a non pros. may be signed. Where defendant compels plaintiff to join, &c.

The general proceedings being very much the same in both courts as to demurrer, where these practical directions may seem to be insufficient, those, K. B. ante, will afford the requisite information, mutatis mutandis. For further practical directions, see those K. B. ante.

FORMS, C. P.

In this court no memorandum is prefixed to the demurrer-book; it commences with the declaration.

See FORMS, K. B. subjoined to this title, ante. Those may be used mutatis mutandis.

DEMURRER TO EVIDENCE.

An objection stated in court on trial to the legal sufficiency of certain facts proved in evidence to support the issue between the parties. What.

As in demurrer to pleadings, the facts are admitted, but their legal pertinency to the matters in issue is denied.

The frequent and more convenient practice of granting a new trial, has almost superseded the resort to this proceeding; but it is by no means to be considered as obsolete.

In stating the practical points relating to demurrer to evidence, I shall avail myself of the luminous view of the subject presented by Eyre, L. C. J. on delivering the opinion of the judges in the case of Gibson and Johnson v. Hunter, 2 H. Bl. 187.

It may be proper to distinguish demurrer to evidence from a bill of exceptions. See title BILL OF EXCEPTIONS. Eyre, L. C. J. C. P. observes, "that in our books there is a good deal of confusion with respect to a demurrer upon evidence, and a bill of exceptions."

It may seem then, that the line of distinction may be shortly stated to be this; that where evidence if offered is rejected, where it ought not to be, by the judge, the party tendering it may have his bill of exceptions: where the evidence is admitted to be given, but its legal application is denied by one party, he may demur to such evidence.

He that demurs to evidence, admits it to be true; and if the matter of fact be uncertainly alleged, or it be doubtful whether it be true or not, because offered to be proved only by presumptions and probabilities, and the other party will demur thereupon; so that the truth of the fact, as well as the validity of evidence, be referred to the court, he that alleges this matter cannot join in demurrer, but ought to pray judgment of the court, that his adversary may not be admitted to his demurrer, unless he will confess

DEMURRER TO EVIDENCE; CASES.

the matter of fact to be true; and if he do not so do, but join in demurrer, he has likewise misbehaved, and the court cannot proceed to judgment, but a *venire de novo* shall go. *Wright v. Pyndar*, *Al.* 18. See also *Baker's case*, 5 *Co.* 104; also *Cocksedge v. Panshaw*, 1 *Doug.* 119; but if evidence be given for the king, and the defendant offer to demur upon it, the king's counsel shall not be compelled to join in demurrer, but the court ought to direct the jury to find the special matter. *Baker's case*, 5 *Co.* 104.

If the plaintiff, in evidence, shew any matter in writing, or of record, or any sentence in the ecclesiastical court, upon which a question in law arises, and the defendant offer to demur in law upon it, the plaintiff joins in demurrer, or waives his evidence. So, if the plaintiff produces witnesses to prove any matter in fact upon which a question in law arises, if the defendant admits their testimony to be true, then also the defendant may demur in law upon it, but then he ought to admit the evidence given by the plaintiff to be true, and the reason thereof is that matter in law shall not be put to laymen. *Ibid.*

On a demurrer to evidence, the only question for the consideration of the court is, whether the evidence given be such as ought to be left to the jury in support of the issue joined, *ibid.*; and, on a demurrer to evidence, party cannot object to the pleadings. *Cort v. Birkbeck*, 1 *Doug.* 218.

The matter of fact being confessed, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury, and being entered on record, will remain for the decision of the judges. And this operation of entering the matter upon record will remain for the decision of the judges. And on this operation of entering the matter upon record, and indeed the whole operation of conducting a demurrer to evidence, ought to be under the direction and controul of the judge *at nisi prius*; or of the court, if the trial be at the bar of one of the king's courts. The court may deny, and hinder a party from demurring, by over-ruling the matter in demurrer, if it seem to them to be clear in law. *Worsley v. Filisker*, 2 *Rol. Rep.* 117. *P. R.* 598, and if over-ruled improperly, it may become the subject of a bill of exception. The court may also regulate the entry of the proceedings upon the record, and the admissions which are to be made previous to the allowance of the demurrer. See the answer of the judges, delivered by Eyre, L. C. J. in *Gibson and Johnson v. Hunter*, 2 *H. Bl.* 187. 205.

The judgment on such a demurrer is, that the evidence is, or is not, sufficient to maintain the issue joined, *Bul. Ni. Pri.* 313.

In *Bul. Ni. Pri.* 314, it is said, that on demurrer to evidence, the most usual course is to discharge the jury, without more inquiry, though they may find damages conditionally, and for a writ of inquiry to be executed after. *Darrose v. Newbott*, *Cro. Car.* 143. *Scolastica's case*, *Plowd.* 410. *Cort v. Birkbeck*, 1 *Doug.* 222. n., and after the execution of the inquiry, the party may move in arrest of the final judgment on any objection to the pleadings. *Cort v. Birkbeck*, *ubi sup.* The last reporter adds a *quare*, If the interlocutory and final judgments would have been

pronounced *uno flatu*, or an interval of four days left between them.

Quære. Whether the defendant can demur to evidence after having paid money into court. *Jenkins v. Tucker*, 1 H. Bl. 90.

Where there is a demurrer to evidence, the judge orders the associate to take a note of the testimony, and that is signed by the counsel on both sides, and the demurrer is affixed to the postea. *Bul. Ni. Pri.* 313.

FORMS.

Afterwards, to wit, on the day and at the place within contained, before ———, one of the justices of our said lord the king, assigned to hold pleas in the court of our said lord the king, before the king himself, and ———, one of the justices of our said lord the king, assigned to hold pleas in the court of our said lord the king, before the king himself, and others their fellows, justices of our said lord the king, assigned to take the assizes in and for the ———, according to the form of the statute in such case made and provided, come, as well the within-named ——— (*plaintiff*), as the within-named ——— (*defendant*), by their respective attorneys within-named. And the jurors of the jury whereof mention is within made, that is to say, ——— (*here insert the names of the jury*) being summoned, likewise come, and being chosen, tried, and sworn to say the truth of the matters within contained, as to the first issue between the parties within joined, say, that the said ——— (*defendant*), is guilty of the trespass within complained of in manner and form as the said ——— (*plaintiff*), hath within complained, and they assess the damage of the said ——— (*plaintiff*), by reason thereof, to ——— (*sum*); and as to the issue lastly within joined between the said parties, the said ——— (*defendant*), shews in evidence to the jury aforesaid, to prove and maintain the issue lastly within joined, on his part, by ———, a witness, produced and duly sworn on his part; that (*here state the evidence as taken down by the associate.*) And the said ———, the plaintiff, says, that the aforesaid matter in form aforesaid, shewn in evidence by the said ——— (*defendant*), to the jurors aforesaid, is not sufficient in law to maintain the said issue so lastly within joined, on the part of the said ——— (*defendant*); and that he the said ——— (*plaintiff*), hath no necessity, nor is he obliged, by the law of the land, to answer to the matter aforesaid in form aforesaid shewn in evidence, and this he is ready to verify; wherefore, for want of sufficient matter in that behalf shewn in evidence to the jury aforesaid, the said ——— (*plaintiff*), prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon the said issue: and that his damages, by reason of the trespass within complained of, may be adjudged to him, &c.

And the said ——— (*defendant*), for that he hath shewn in evidence to the jury aforesaid, sufficient matter to maintain the issue within joined, on the part of the said ——— (*defendant*), and which he is ready to verify; and for as much as the said ——— (*plaintiff*), doth not deny, nor in any manner answer, the said matter, prays judgment, and that the said ——— (*plaintiff*), may be barred from having his aforesaid action against him; and that the jury aforesaid may be discharged from giving their verdict upon the said issue lastly within joined, &c.; wherefore, let the jury aforesaid be discharged by the court here, by the assent of the parties, from giving any verdict thereupon.

No. 1.
Form of a demurrer to evidence by the plaintiff; one issue found for him at the assizes.

No. 2.
Joinder in demurrer.

No. 3.
Joinder in demurrer by the plaintiff, where the defendant has demurred; the damages assessed conditionally.

And the said ——— (*plaintiff*), for that he hath shewn sufficient matter in maintenance of the said issue in evidence to the said jurors, which matter the said ——— (*defendant*), doth not deny, nor in any manner answer thereto, prays judgment, and his damages, by reason of the premises to be adjudged to him, &c.

Whereupon it is told to the jurors aforesaid, that they shall inquire what damages the said ——— (*plaintiff*), has sustained as well by reason of the matter shewn in evidence as aforesaid, as for his costs and charges by him about his suit in this behalf expended, in case it shall happen that judgment shall be given upon the evidence aforesaid for the said ——— (*plaintiff*). And the jurors aforesaid, upon their oaths aforesaid, thereupon say, that if it shall happen that judgment shall be given for the said ——— (*plaintiff*), upon the evidence aforesaid, then they assess the damages of the said ——— (*plaintiff*), by him sustained by reason of the matter shewn in evidence as aforesaid, besides his costs and charges by him about his suit in this behalf, expended to £——, and for those costs and charges to 40s. And thereupon the said jurors, by the assent of the said parties, are discharged from giving any further verdict upon the premises.

No. 4.
Judgment for the evidence demurred to.

And thereupon all and singular the premises being seen by the said court of our said lord the king, before the king himself, now here, fully understood and considered, it seems to the said court here that the aforesaid matter to the jury aforesaid, in form aforesaid, shewn in evidence by the said ——— (*plaintiff*), is sufficient in law to maintain the said issue above joined, on the part and behalf of the said ——— (*plaintiff*). Therefore it is considered by the said court of our said lord the king, before the king himself here, that the said ——— (*plaintiff*), doth recover his aforesaid damages by the jury aforesaid, in form aforesaid assessed, and also £——, for his costs and charges, by the said court of our said lord the king, now here adjudged of increase to the said ——— (*plaintiff*), by his assent, which said damages in the whole amount to £——; and that the said ——— (*defendant*), be in mercy, &c.

DEPARTURE. *Departure in pleading.*

What. This is where in pleading one quits the matter already pleaded; and in whatever stage of the pleadings this is done, it is properly called departure, and, as elsewhere defined, it is "as much as to deny what he formerly admitted, which is to say and unsay, and is naught for the uncertainty, because an issue cannot be joined upon it." See 1 *Lit. P. R.* 609.

What is or is not departure is of great importance.

What is and what is not departure in pleading, is sometimes matter for great consideration. Anon. 3 *Salk.* 123

It is no departure to vary from that which is not materially alleged. *Primir v. Phillips*, 1 *Salk.* 222; but where performance is pleaded, and matter of excuse is afterwards set forth in the rejoinder, it is departure. *Ibid.*

In trespass to a justification by distress, if the plaintiff replies an abuse, it is no departure, *id.* 221, but if in covenant the defendant pleads performance, and after rejoins that the plaintiff ousted him, it is a departure. *Raym.* 22.

How to be taken advantage of.

The only mode of taking advantage of a departure is, by demurrer; for, if the defendant, instead of demurring, take issue upon a replication containing a departure, and it be found against him,

the court will not arrest the judgment. *Lee v. Rayner, Sir T. Raym.* 86. The doctrine of departure is concisely, but most elaborately, illustrated by the late Serjeant Williams, 2 *Saund.* 84, n. 1.

DEPOSIT; *Deposit in lieu of Bail.* See title **ARREST**, where the stat. 43 G. III. c. 46, s. 2, relating to this title is mentioned.

Where money is paid to the sheriff, upon an arrest, it shall be presumed to have been paid as a deposit in lieu of bail, unless a discharge, or some acknowledgment in writing be given to the defendant for the debt and costs. *Wain v. Bradbury, 1 Smith Rep.* 127.

Where money considered as a deposit within the statute.

And the court will upon bail above being put in and perfected, order re-payment to the bail, or other person, by whom it was actually deposited, and not to the defendant. *Nunn v. Powell, Ibid.* 13.

To whom deposit returned.

And no poundage can be taken either by the sheriff or officer of the court, on money deposited. 1 *Chit. Rep.* 529. See title **POUNDAGE**.

The cases in which the plaintiff may think fit to enter a common appearance, or file common bail for the defendant, are where he claims and means to proceed for more than the sum indorsed on the writ; but in these cases there is no provision made by the act with regard to costs, if he should not eventually recover more than that sum, nor for his refunding any part of it, if he should recover less.

Where plaintiff proceeds without special bail.

Omissions in the act.

As to this act, Lord Ellenborough, L. C. J. is reported to have said, "This has been sometimes erroneously called my act. The truth is, I altered these clauses a little, and made them less mischievous than otherwise they would have been. But I am afraid they are productive of more mischief than good after all." 1 *Smith Rep.* 128.

Observation by Lord Ellenborough, C. J.

If the plaintiff desire to obtain the money out of court, he must move the court that the money deposited with the sheriff, and paid into court, under the statute, may be paid over to him; this is a rule *nisi*. See title **MOTION**, if necessary.

How plaintiff is to obtain the deposit.

So, likewise, in case the defendant put in and perfect bail to the action, he may move that the money deposited with the sheriff, and paid into court under the above statute, may be repaid him; this also is a rule *nisi*. See title **MOTION**, if necessary.

How the defendant.

And where, after defendant had applied on the ground above stated, a rule had been obtained by plaintiff for setting aside allowance of bail, and defendant was then rendered, the court directed the money to be paid out to defendant, after deducting the costs of two rules. *Gould v. Berry, 1 Chit. R.* 145.

So, where bail put in above, renders the defendant, instead of justifying. *Harford v. Harris, 4 Taunt.* 669. *Chadwick v. Battye, 3 M. & S.* 283. S. P.

Where a defendant cannot be found, in order to serve him personally with a rule for taking money deposited in the hands of the sheriff in lieu of bail, the court will allow the service to be good by leaving a copy of the rule at the defendant's last place of abode,

DEPOSIT. DEPOSITION; *Deposition of Witness*; CASES.

and sticking it up in the office. *Peale v. Triscott*, 1 *Chit. R.* 675. and see *Id.* 466, in notes, 170.

A friend of the defendant deposited with the sheriff on the defendant's arrest a sum in lieu of bail, under this statute. Bail was afterwards put in, and the defendant having become bankrupt, surrendered in their discharge; the friend applied for the money deposited, but the court held themselves bound by the statute to order its re-payment to the defendant. *Edelsten and Another v. Adams*, 8 *Taunt.* 557.

DEPOSITION. *Deposition of a Witness.*

Where depositions necessary, and how.

If the testimony of a witness going or living abroad, and who therefore cannot be present at the trial, be required in a cause, leave of the court in term time, and of a judge in vacation, may be obtained, if he be yet in England, for an order that he may be examined upon interrogatories *de bene esse*. Of course the answer or deposition cannot be used, if it be made apparent that the witness might have been present at the time of the trial.

Where examined before commissioners.

And if the witness reside in the country, or abroad, the application is then made that he may be examined before commissioners, to be mutually appointed or approved for that purpose.

Where consent requisite.

The consent of the opposite party is requisite, and if such consent is withheld, the court will assist either party to whom such testimony appears to be necessary: thus, if the plaintiff will not consent, the court will, at the instance of the defendant, put off the trial, and if the defendant will not consent, the court will not give him judgment as in the case of a nonsuit. *Mostyn v. Fabrigas*, 1 *Cowp.* 161. 174. In this cause a case was cited, where it was said, that if a prosecutor would not consent to the examination of a witness in Scotland, the court would put off the trial from time to time for ever. *Furley v. Newnham*, 2 *Doug.* 419.

But this position must be read with some limitation; for in a subsequent case it was decided, that where a party has bound himself not to delay the other; and where it also appears that the depositions to be obtained are of a contradictory nature, that the court will not put off a trial for want of a consent that a witness may be examined on interrogatories by commission. *Calliand v. Vaughan*, 1 *B. & P.* 210.

Neither will the court, upon motion, give leave to examine an attesting witness to a deed upon interrogatories, and to give such examination in evidence at the trial, on the ground that he is incapable through illness of attending in person, and that he is not likely to recover, so as to be able to attend, notwithstanding it also appears by the affidavit that the defendant had at one time admitted the execution of the deed; nor will the court, on these grounds, grant a rule for dispensing with the attendance of such witness at the trial. *Jones v. Brewer*, 4 *Taunt.* 48.

As to costs.

In K. B. the party succeeding is not entitled to the costs of examining witnesses on interrogatories, or taking office copies of depositions; but each party applying pays his own expence, unless it be otherwise expressed in the rule. *Collett v. Lord Keith*, 2 *East*, 259. *Taylor v. The Royal Exchange Assurance Company*, 8 *East*, 393.

In C. P. it seems to be otherwise: in that court, the party succeeding is entitled to have the costs paid, where depositions were taken abroad. See the case of *Muller v. Hartshorn*, 3 B. & P. 556.

PRACTICAL DIRECTIONS, K. B.

If witness reside in town, the application is made on a special affidavit of his being a material witness, and that he is going abroad. See No. 1. When witness resides in town.
FORMS subjoined.

If by motion, the rule is nisi; Counsel's fee, 10s. 6d. rule, 2s. per sheet; if to a judge, a summons. See, if necessary, titles MOTION. SUMMONS. The opposite party probably consents; for this purpose indorsing instruction paper to consent to a rule for the examination of witnesses. Give same to counsel, with 10s. 6d. fee. Rule or order, as the case may be, is drawn up; the rule is paid for according to the length. Interrogatories may then be duly prepared. See Nos. 7, 8, and 9, FORMS subjoined; being engrossed, counsel's hand is obtained; a copy is delivered over to the opposite attorney, together with a copy of the rule or order; the same are then left with a judge's clerk, generally the clerk of the chief justice, who for this purpose is the examiner; pay 2s. If in town, give notice of the time of examination to the opposite attorney, appoint the witness to attend to be examined and duly sworn. The other party is also at liberty to exhibit interrogatories, a copy of which he in like manner delivers over to the attorney, and gives notice of the time of examination. See No. 10, FORMS subjoined.

The depositions so taken are engrossed, and delivered by him, on application, to each party; pay so much per sheet for each copy.

If the witness be examined in the country, the depositions are transmitted by the commissioners to the clerk of the rules K. B. or to the prothonotary C. P.

The deposition may also be taken in this way, if it appear by oath and proper medical certificate, that the witness is ill, or in a precarious state of health, so that probably he will not be able to attend the trial.

If the witness reside abroad, or in the country, the application must be made for a rule to be directed to certain commissioners, to be mutually named. If abroad.

In the case of naming commissioners, two are generally named by each party, and the clerk of the rules, or prothonotary, I believe, inserts them by consent or approval.

The commissioners are authorized by this rule to examine the witnesses, and to take their depositions; these they duly return, agreeably to the rule, No. 3, FORMS, subjoined. When returned, copies of the depositions may be had on application to the clerk of the rules, or to the prothonotary.

With relation to testimony to be obtained in the East Indies, statute 13 G. III. c. 63. s. 44. enacts "that when and as often as the East India Company, or any person or persons shall commence or prosecute any action or suit in law or equity, for which cause hath arisen in India, against any other person or persons in any of his majesty's courts at Westminster, it shall and may be lawful for such courts respectively, upon motion there to be made, to provide and award such writ or writs in the nature of a mandamus or commission as therein mentioned, for the examination of witnesses; and such examination being duly returned, shall be allowed and read, and shall be deemed good and competent evidence at any trial or hearing between the parties in such cause or action." If in the East Indies.

*Mr. Tidd enumerates several cases in which these writs have been issued. *Mullick v. Lushington*, M. 26 G. III. *East India Company**

DEPOSITION; PR. DI. K. B.; FORMS.

v. Lord Malden, E. 3 G. III. Taylor v. East India Company, M. 33 G. III. and observes, that in one of them, Spalding v. Mure, T. 35 G. III. the motion being made on the last day of the term, the court awarded such a writ before issue joined.

Forms of the rules for the examination of the witnesses by commissioners are subjoined, Nos. 2, 3, and 4: the practitioner will from thence gather information as to the notice to be given to the opposite commissioners of the time of examination. The respective oaths are subjoined, Nos. 5, 6.

FORMS.

No. 1. [Court.] [Title cause.]
Affidavit on motion of summons, &c. _____ of _____ the above-named plaintiff, maketh oath and saith, that this action is brought by him for the recovery of, &c. (stating the cause of action generally) And this deponent further saith, that _____ (the witness) is, as this deponent is advised and verily believes, a material witness for this deponent in the said cause, and that he cannot safely proceed to the trial thereof without the testimony of the said _____ (the witness). And that the said _____ (the witness) is about to depart from this kingdom on _____ next, or before that day, as he hath informed this deponent, and which information this deponent verily believes to be true.
Sworn, &c. (Signed)

No. 2. _____ } Upon, &c. On _____ in this term. It is ORDERED
Rule where witness is going } v. { that the plaintiff be at liberty to examine (*de bene esse*)
abroad, on examination before the lord chief justice. _____ } such of his witnesses as are going abroad upon interrogatories to be exhibited to them before the lord chief justice, or some other of the justices of this court, two days notice of the time and place of such examination being first given to the attorney for the defendant. And it is further ordered that the interrogatories, depositions, and cross-examinations taken in manner aforesaid be admitted to be read and given in evidence at the trial of this cause, saving all just exceptions.

No. 3. _____ } Upon reading, &c. on _____ It is ordered that the
Form of the rule for examining witnesses in Dublin before commissioners. v. { defendant be at liberty to examine (*de bene esse*) _____
_____ } one of his witnesses, who resides in Dublin, upon interrogatories to be exhibited to him before (commissioners) all (four) of the said city of Dublin, esquires, commissioners aforesaid, on the part of the said defendant, three days notice of the time and place of such examination being given to the plaintiff or his attorney. And it is further ordered, that the interrogatories and depositions, taken in manner aforesaid, be transmitted under seal to Charles Short, esq. clerk of the rules and orders on the plea side of his majesty's court of K. B. at Westminster, and be admitted to be read and given in evidence at the trial of this cause, saving all just exceptions.

No. 4. _____ } It is ordered, that the plaintiff be at liberty to examine
Rule for examining and cross-examining witnesses before commissioners. v. { (*de bene esse*) _____ of his witnesses, who are at _____,
_____ } upon interrogatories to be exhibited to them before _____ commissioners appointed on the part of the plaintiff, and _____ commissioners appointed on the part of the defendant; six days notice of the time and place of such examination being first given to the commissioners on the part of the defendant; and that the commissioners on the part of the defendant be at liberty to cross-examine the said witnesses. And it is further ordered, that the interrogatories, depo-

sitions, and cross-examinations, taken in the cause aforesaid, be transmitted under seal to Charles Short, esq. clerk of the rules and orders on the plea side of his majesty's court of King's Bench, at Westminster, and be admitted to be read and given in evidence at the trial of this cause, saving all just exceptions.

You shall, according to the best of your skill and knowledge, truly and faithfully, and without partiality to any or either of the parties in this cause, take the examination and deposition of every witness produced and examined by virtue of the commission within written, upon the interrogatories now produced and left with you.

No. 5.
Oath taken by
commissioners.

So help you God.

You shall faithfully, and without partiality to any or either of the parties in this cause, take and write down, transcribe, and engross the depositions of all and every witness and witnesses produced before and examined by the commissioners, or by any of them, named in the commission within written, as far forth as you are directed and employed by the said commissioners, or any of them, to take down, write, or engross the said depositions.

No. 6.
Oath to be taken
by clerk.

So help you God.

Interrogatories to be administered to ——— a witness to be produced, sworn, and examined, on the part and behalf of ———, plaintiff in a certain cause now depending in the court of our lord the king, before the king himself, against ———, defendant therein, before Sir ———, one of his majesty's justices of the court of King's Bench, pursuant to a rule of the said court, made on ———, the ——— day of ———, in the ——— year of the reign of his majesty king George the Fourth, or pursuant to an order of the said ——— Sir ———, made the ——— day of ——— 182 ———

No. 7.
Interrogatories
for plaintiff.

First. Do you know the parties, plaintiff and defendant, in the title of those interrogatories named, or either, and which of them, and how long have you known either and which of them? Declare the truth, and your knowledge herein.

Secondly. (The first and last interrogatories are formal and usual; see the last in the next precedent; the second, or any intermediate number of interrogatories which may be exhibited, will of course embrace the testimony sought to be applicable to the facts intended to be proved; but it is suggested in all the practical books that especial care must be taken that the questions proposed to attain this end be not too leading.)

Look upon the deed, instrument, or writing, shewn to you at this present time of your examination, marked with the letter A. and purporting to be an indenture of release, bearing date, &c. between, &c. (or, "of lease, being," &c.; or "an agreement, being," &c. *as the case may be*) was such deed or writing sealed and delivered (or, if an agreement, not by deed, "signed,") in your presence, and by whom? Were you a subscribing witness to the sealing and delivery (or "signing") thereof? And is the name ———, indorsed thereupon, and appearing as the name of one of the witnesses, of your own hand-writing? Do you know the hand-writing of ———, appearing to be the other witness to the said deed or writing? Is the name of ———, indorsed thereupon, of the proper hand-writing of the said ———?

No. 8.
Interrogatory to
prove a deed, &c.

DEPOSITION; FORMS; PR. DI. C. P. DETINUE.

and did you see him set and subscribe his name as a witness thereto? Declare, &c. (*as before*).

Lastly. Do you know of any other matter or thing, or have you heard, or can you say any thing touching the matters in question in this cause that may tend to the benefit and advantage of the said plaintiff besides what you have been interrogated unto, declare the same fully and at large, as if you had been fully interrogated thereunto.

No. 9.
Interrogatories
for defendant.

Interrogatories to be administered to ———, a witness to be produced, sworn, and examined on the part and behalf of ———, the defendant in a certain cause now depending against him in his majesty's court of King's Bench, at Westminster, at the suit of ———, plaintiff, before Sir ———, one of his majesty's justices of the court of King's Bench, pursuant, (&c. *as in No. 7.*)

No. 10.
Interrogatories
to cross-examine.

Interrogatories to be administered by way of cross-examination to ———, a witness to be produced, (&c. *as in the last*).

PRACTICAL DIRECTIONS, C. P.

The practice in this court in relation to examining witnesses abroad differs materially from that of K. B. In C. P. there formerly issued, and even now, if applied for, a rule for a commission to be directed to certain persons, and the commission, in pursuance of such rule issues, signed by the lord chief justice; but the latter practice, I find on inquiry, is similar to that of K. B. In which court, as above stated, the rule has the force and effect of a special commission, or dedimus potestatem.

As to other matters, the practice will be the same as in the court of K. B. mutatis mutandis as mentioned.

DETAINDER. See titles OUTLAWRY. PRISONER.

DETINUE. *Action of Detinue.*

Where it lies,

An action, said by Chambre, J. to be "as old as any action known to the law;" it lies at the instance of any person who has either an absolute or a special property in goods against another, who is in the actual possession either by delivery or finding of such goods, and refuses to deliver or render them. 1 *Inst.* 286 b.

Detinue is among the *brevia formata*, whereas case is among the *brevia magistralia*; detinue in general admits wager of law; case does not; and in *Isaac v. Clark*, 2 *Bull.* 308. the question was, whether detinue or case were right to have been brought. Dodderidge, J. made the distinction in terms.

Where wager of
law not allowed
in detinue.

It is observed by Mr. Selwyn, 1 *Ni. Pri.* 696, (n.) that "this action is fallen into disuse, on account of the defendant's being permitted to wage his law;" but this observation must be qualified; in detinue for deeds and charters concerning the inheritance of lands, or an indenture of lease, the defendant shall *not* wage his law. 1 *Inst.* 295.

As to the finding.

Though the declaration state the finding, yet it has been lately holden that the allegation of finding was sufficiently proved, by shewing that the goods came to the defendant by wrong, at least unless the finding be traversed. *Mills v. Graham*, 1 *N. R.* 140.

Actual possession by the plaintiff is not requisite; *property* is sufficient to ground this action. Thus an heir may maintain detinue for an heir-loom. *Bro. Abr. tit. Detinue*, pl. 30. And if goods be delivered to A. to deliver to B., B. may have detinue; but detinue will not lie by a reversioner *Gordon v. Harper*, 7 T. R. 9. there, case being the remedy.

Possession not necessary.
Property sufficient.

It is said, that if the defendant took the goods tortiously, this action is not maintainable.

Where goods taken tortiously.

And possession and detainer of the goods by the defendant, is necessary to maintain this action. *Isaac v. Clark*, 2 *Bulst.* 308. Hence executors are chargeable in this action by reason of their possession only. *Bro. Abr. tit. Detinue de Biens*, pl. 19.

What necessary to support action.

The goods must be specific, and capable of being identified or ascertained; hence detinue will not lie for loose money, corn, &c.

Goods specific.

The practice in this action very much resembles that in TROVER, which title see. The stat. 25 *Edw. III. c. 17*, authorizing arrest in this case, see titles AFFIDAVIT to hold to bail. AC ETIAM. DECLARATION, No. 13, FORMS.

As to process in detinue.

The general issue in this action is, *non detinet*, that the defendant does not detain, &c.

General issue in detinue.

The judgment is that the plaintiff recover the goods, &c. or in the alternative, that if the plaintiff cannot have the goods and damages (for their detention) the value thereof. Therefore it will be seen that the jury be duly informed of, and find the respective values of the different articles demanded; for an omission in this respect cannot be supplied by a writ of inquiry. *Cheyney's Case*, 10 Co. 118, 119. *Herbert v. Waters*, 1 *Salk.* 206.

Judgment.

The form of the execution will of course be governed by the verdict. See titles FIERI FACIAS. LIMITATION OF ACTIONS.

DEVASTAVIT.

If a judgment be obtained against an executor or administrator, and he shall have paid debts due on simple contract before, having notice of those due on specialty; or if he shall have paid legacies before either, and hath not enough left for debts and legacies, and also in other cases of improper disposition of the effects of the deceased, he is said to have wasted, *devastavit*, the goods or assets of such person so deceased; and upon such judgment an action may be brought, wherein such waste may be suggested. See *Dyer*, 232. And the executor or administrator is said to be liable to the amount of the judgment by reason of the *devastavit*. A *devastavit* may be also suggested in an action against the executor or administrator of an executor or administrator, without a previous judgment. See statute C. II. *recit. post.*

What.

To advert to all the cases to be found in the books, having reference to this title, would very unnecessarily extend it; but to mention a few may not be useless.

What shall be waste.

Thus, if the executor or administrator give away the assets, or consume them, or if he lay them out in funeral expences, inappropriate to the estate or degree of the deceased; or if he embezzle the goods; or if he pay debts due from his testator or intestate out of their legal order; as, for instance, if he pay simple contract

debts before those due on specialty; or if he pay or assent to any legacy when, with relation to creditors, the funds are deficient: in all or any of these cases, he is said to have wasted the assets of the deceased. See *Com. Dig.* title *Administration* I. (1). 3 *Bac. Ab.* 77.

Notice of the existence of the specialty debt is necessary to subject the executor to a *devastavit*. *Brooking v. Jennings*, 1 *Mod.* 175.

And where there are several executors, the fraud or negligence of one is not chargeable on the rest, 1 *Rol. Abr.* 929.

What will not be a *devastavit*.

If an administrator, &c. pay with his own money the debts of the intestate, &c. in such order as the law appoints, to the value of all the goods, such administrator may lawfully dispose of the goods as he pleases, and it will not be a *devastavit*. *Merchant v. Driver*, 1 *Saund.* 307, 8.

Upon the law touching this title, see the case of *Wheatley v. Lane*, 1 *Saund.* 216, and the notes of the very learned editor, the late Mr. Serjeant Williams, thereon, particularly n. 8. 219.

Practice.

In relation to *devastavit*, very little is to be found in former practical books; but the most usual practice appears to be this: If a judgment be first obtained against the executor or administrator, a *fiery facias* is to be issued, and the sheriff's return of *nulla bona* being procured, an action of debt is commenced on such judgment, suggesting a *devastavit*; the judgment is stated; also the writ and return in the declaration; and on the trial the record of the judgment, the *fiery facias*, and the return, will be sufficient evidence to prove the case, *Ib.* The record of the judgment being conclusive upon the defendant that he has assets, but (contrary to the old law on this head, see *Harrison v. Beccles*, cited 3 *T. R.* 688.) on a verdict of *plene administravit*, it is however only an admission of assets to the extent of the assets proved to be in his hands*. If, therefore, upon a *fiery facias de bonis testatoris* issued on a judgment obtained against an executor, either no goods can be found which were the testator's, or not sufficient to satisfy the demand; or, which is the same thing, if the executor will not expose them to execution, that is evidence of a *devastavit*; and therefore it is very reasonable that the executor should become personally liable and chargeable *de bonis propriis*, 1 *Saund.* 219 a. 219 b. and the authorities there cited.

Upon a suggestion in the special writ of *fiery facias* of a *devastavit* by the executor, it was formerly the practice to direct the sheriff to inquire by a jury, whether the executor had wasted the goods, and if the jury found he had, then a *fiery facias* was sued out against him; and, unless he made a good defence thereto, execution was awarded, &c. *de bonis propriis* but afterwards the *fiery facias* inquiry and *scire facias* were incorporated into one writ; thence called a *scire facias* inquiry. This mode of

* In *Harrison v. Beccles*, above cited, Lord Mansfield, C. J. appears to have decided on principle against the old authorities; but Lord Kenyon, C. J. after mentioning that that decision did

Lord Mansfield honour, with dignified candour avows, that in deciding *Erving v. Peters*, 3 *T. R.* 693, he yielded to authority, but not to reason.

proceeding is by no means obsolete, and a form of the entry containing the writ is accordingly inserted, No. 7. FORMS, subjoined.

The action *may* be brought upon the judgment upon a bare suggestion of a *devastavit*, without any writ of *feri facias* first taken out upon the judgment. *Wheatley v. Lane*, 1 *Sid.* 397. but the usual course is as above stated.

Upon a *devastavit* being returned, the executor or administrator may be held to bail, without an affidavit, by a judge's order; but if the action be brought on a judgment upon a suggestion only of a *devastavit*, an affidavit is necessary to hold the executor to bail, as in ordinary cases. *Dupratt v. Testard*, *Carth.* 264.

Of holding defendant executor to bail.

By statute 30 C. II. c. 7. explained and made perpetual by stat. 4 & 5 W. & M. c. 24. s. 12. the executors or administrators of any executor or administrator, whether rightful, or in his own wrong, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living. On these statutes Mr. Serjeant Williams *ubi supra*, observes, that if a judgment be had against an executor, who afterwards dies, an action may now be brought against his executor or administrator upon the judgment, suggesting a *devastavit* by the first executor, and the judgment is as conclusive upon the representative of the executor, that he (the executor) had assets to satisfy the judgment obtained against him, as it is upon the executor himself.

Where executor, &c. of executor, &c. liable. Statutes.

But an action lies against an executor of an executor, in any case where the first executor shall have committed a *devastavit*, and it does not seem that a judgment against him is the foundation of the action against the second executor; for a *devastavit* of the former executor may, it seems, be suggested, and any act amounting thereto may be given in evidence. To the action, whether on a judgment against the former executor, or where the *devastavit* by such former executor is only suggested, the second executor may plead *plene administravit*.

This is a general practical outline of the title *devastavit*. For information, less adapted to a practical work, see the note of Mr. Serjeant Williams, *ubi supra*.

FORMS.

_____ is indebted, &c. Upon and by virtue of a certain judgment, recovered by this deponent in this honourable court, in _____ term last, against the said _____, as executrix of _____, deceased. And that to writ of *feri facias* issued upon the said judgment, the sheriffs of London have returned *nulla bona* and a *devastavit* by the said _____ of the effects of the said _____, deceased, to the amount of £____ (insert the sum sworn): And this deponent further saith that (negative a tender; as under the head *Affidavit*.)

No. 1.
Affidavit of debt on a *devastavit* returned against an executrix.

George, (&c.) To the sheriff of _____, greeting: Whereas by our writ we lately commanded you that of the goods and chattels of _____, in the hands of _____, executrix of the last will and testament of the said _____, to be administered in your bailiwick, you should cause to be made £____, which _____ lately in

No. 2.
Capias ad satisfaciendum in debt against an executrix, after a *devastavit* return-

ed on a *feri fa-*
cias, B. R.

our court before us recovered against the said _____ in his lifetime, of debt also _____ which in our same court before us were adjudged to the said _____ for his damages which he sustained, as well by occasion of the detaining that debt as for his costs and charges expended by him about his suit in this behalf, whereof he is convicted, as appears to us of record, if she had so much in her hands, then the said damages of the proper goods and chattels of the said _____, and that you should have that money before us at Westminster, on _____ next, after _____ last past, to render to the said _____ for the debt and damages aforesaid, and you at that day returned to us that the said _____ had sold and wasted divers goods and chattels which were of the said _____ at the time of his death, to the value of the debt and damages aforesaid, and had converted and disposed to her own use the money coming therefrom, so that you could not cause to be levied or made the said debt and damages of the goods and chattels of the said _____, and you further certified to us that the said _____ had no goods or chattels in your bailiwick, whereof you could cause the said damages to be made: Therefore we command you, that you take the said _____, if she should be found in your bailiwick, and safely keep her, so that you may have her body before us at Westminster, on _____ next after _____, to satisfy the said _____ of the said debt and damages in form aforesaid, and have there then this writ. Witness, &c.

No. 3.
Testatum ca. ss.
against an execu-
tor after a *devastavit* and *nulla bona* returned
C. P.

George the Fourth, (&c.) To the sheriff of _____, greeting:
Whereas we lately by our writ commanded our sheriff of _____, that of the goods and chattels in his bailiwick, which were of _____, late of _____, at the time of his death, in the hands of _____, late of _____, executor of the last will and testament of the said _____, he should cause to be made, as well a certain debt of £_____, which _____, in our court before our justices at Westminster, recovered against the said _____, as also £_____, which in our said court were adjudged to the said _____, for his damages which he had by occasion of the detaining that debt, if the said _____ had so much in his hands, to be administered, and if he had not then the said damages to be levied of the proper goods and chattels of the said _____, and should have that money before our justices at Westminster, on the _____, last past, to render to the said _____, for his debt and damage aforesaid, whereof he is convicted, and our said sheriff of _____, at that day sent to our said justices at Westminster, that the said _____ had, before the coming of the said writ, sold and wasted divers goods and chattels which were of the said _____ at the time of his death, to the value of the debt and damages aforesaid, and had converted the money arising therefrom to his own proper use, so that he could not levy or cause to be made the said debt and damages of the goods and chattels of the said _____, and that the said _____ had no goods or chattels of his own proper goods and chattels in his bailiwick, whereof he could cause to be made the said damages, or any part thereof, as by that writ he was commanded; therefore we command you, that you take the said _____, if he may be found in your bailiwick, and keep him safely, so that you may have his body before our justices at Westminster, on _____, to satisfy the said _____ of the debt and damages aforesaid: And whereupon our sheriff of _____, from the day of _____, in _____ last past, sent to our justices at Westminster, that the said _____ was not

found in his bailiwick; whereas it is testified in our said court, that the said _____ lurketh and secreteth himself in your county, and have there this writ. Witness, &c.

The within-named _____, has no goods or chattels which were of the within-named _____ at the time of his death in his hands, to be administered in my bailiwick, whereof I can cause to be made the damages (or, if in debt, "debt and damages") within mentioned, or any part thereof, and he has not any of his own proper goods or chattels in my bailiwick, whereof I can cause to be made the within-mentioned sum of £_____, parcel, &c. (or, if in debt, "the damages aforesaid") or any part thereof, according to the exigency of this writ.

The answer, &c.

George, (&c.) To the sheriff of _____, greeting: Whereas we lately commanded our sheriff of _____ that he should cause to be levied in his bailiwick of the goods and chattels which were of _____, of _____, deceased, at the time of his death, in the hands of _____ and _____, being to be administered, as well a certain debt of £_____ which _____, in our said court before us at Westminster, recovered against the said _____, as £_____, which were adjudged to the said _____ in the same court before us for her damages which she sustained, as well by reason of detaining her said debt, as for her costs and charges by her laid out about her suit in that behalf, whereof the said _____ were convicted, as it appeared to us of record, if they had sufficient of the said goods and chattels in their hands to be administered, and if they had not, then the damages aforesaid of the proper goods and chattels of the said _____ and _____, and that he should have that money before us at Westminster, on _____ now last past, to render to the said _____ for her debt and damages aforesaid: And whereas at that day our said sheriff returned to us that the said _____ and _____ had no goods nor chattels which were of the said _____ at the time of his death in their hands, to be administered in his bailiwick, whereof he could levy the debt and damages aforesaid, or any part thereof, but that divers goods and chattels which were of the said _____ at the time of his death, to the value of the debt and damages aforesaid, after the death of the said _____ came to the hands of the said _____ and _____ before the coming of that writ to him, who wasted and converted, and disposed of the said goods and chattels to their own use, and he also returned that the said _____ and _____ had no goods nor chattels of their own in his bailiwick, whereof he could levy the damages aforesaid: And whereas it has been signified to us in our said court before us, that the said _____ and _____ had divers goods and chattels of their own in his bailiwick, wherewith to satisfy the debt and damages aforesaid: Therefore we command him that he should cause the debt and damages aforesaid to be levied of the proper goods and chattels of the said _____ and _____ in his bailiwick, and that he should have that money before us at Westminster, on a certain day now past, to render to the said _____ for her debt and damages aforesaid, and our said sheriff of _____ at that day returned to us, that by virtue of the said writ to him directed, he made of the goods and chattels of the said _____ (the testator) £_____, and that he had paid the same to the said _____ in part of satisfaction of the said debt and damages; and that the said _____ (the testator) had no other or more goods and chattels in his

No. 4.

The return of *nulla bona testatoris nec propria* in an action against an executor or administrator with a *devastavit*.

No. 5.

Fieri factas de bonis propriis; return of nulla bona recited; devastavit returned. Levy de bonis propriis of part, testatum for the residue.

bailiwick, whereof he could levy the residue of the said debt and damages; whereupon, on the behalf of the said ——— it is sufficiently testified in our court before us, that the said ——— and ——— have goods and chattels which were of the said ———, (the testator), at the time of his death, sufficient in your bailiwick, whereof you may cause to be levied the residue of the said £——, therefore, we command you, that of the goods and chattels, which were of the said ——— at the time of his death in the hands of the said ——— and ———, in your bailiwick, you cause to be made £—— residue of the said £——, and have that money before us at Westminster, on ——— next after ———, to render to the said ——— for the residue of her debt, and damages aforesaid, and have then there this writ. Witness, &c.

No. 6.
Entry of return of *devastavit* upon a *feri facias de bonis testatoris*, &c. to the county palatine of Lancaster, and upon the return of part levied, award of *feri facias de bonis propriis* for the residue; and upon return of *nulla bona*, award of *capias ad satisfaciendum*, which being returned *non est inventus*, award of *testatum* for the residue.

At which day, before the lord the king, at Westminster, comes the said ——— in his proper person, and ——— chancellor, of our county palatine of Lancaster aforesaid, returns, that by virtue of the said writ to him thereupon directed, he hath commanded the sheriff of the county of Lancaster aforesaid, that the said sheriff should in all things fully execute the said writ of the said lord the king, which said sheriff answered him, that before the coming of the said writ of the said lord the king to him directed, divers goods and chattels, which were of the said ———, deceased, at the time of his death, came to the hands and possession of said ———, to be administered, which said goods and chattels, the said ——— afterwards, and before the coming of the said writ to him, had eloiigned, wasted, and converted to his own use: wherefore the said sheriff could not cause the said £—— for the damages aforesaid, or any part thereof, to be made of the goods and chattels, which were of the said ——— deceased, as by the said writ he was commanded, and the said sheriff further answered the said chancellor, that of the proper goods and chattels of the said ——— he had caused to be made the said £——, for the costs and charges aforesaid as he was commanded, which said £—— by the said sheriff brought here into court, by the same court here are delivered to the said ———, in part of the damages aforesaid; therefore, let the said sheriff be acquitted of the said £——, &c. And as to £—— residue of the damages aforesaid, it is considered that the said ——— have execution against the said ——— of the said £——, residue of the damages aforesaid, of the proper goods and chattels of the said ———; therefore, it is commanded to the said chancellor of our county palatine aforesaid, that by the writ of the said lord the king, to be duly made and directed to the sheriff of the said county of Lancaster, he cause it to be commanded to the sheriff of that county, that of the proper goods and chattels of the said ———, in his bailiwick, he cause to be made the said £——, residue of the damages aforesaid, and that he have that money before the said lord the king at Westminster, on ——— next after ———, to render to the said ——— in form aforesaid, the same day is given to the said ———, there, &c. At which day, before the said lord the king, at Westminster, comes the said ——— in his proper person, and the said ——— chancellor of our county palatine aforesaid, returns, that by virtue of the said writ to him thereupon directed, he hath commanded the sheriff of the said county of Lancaster, that the said sheriff should in all things fully execute that writ, which said sheriff answered him, that the said ——— had no goods or chattels in his bailiwick, whereof he could cause to be made the said £——,

or any part thereof, therefore, it is commanded to the chancellor of our county palatine aforesaid, that by the writ, &c. he cause it to be commanded, &c. that the said sheriff take the said _____ if, &c. and him safely keep, so that he may have his body before the said lord the king at Westminster, on _____ next after _____ to satisfy the said _____ of the said £_____ residue of the damages aforesaid, the same day is given to the said _____ there, &c. At which day before the said lord the king at Westminster, comes the said _____ in his proper person, and the said chancellor of our county palatine aforesaid, returns, that by virtue, &c. he commanded the said sheriff, &c. which said sheriff answered him, that the said _____ is not found in his bailiwick, whereupon on behalf of the said _____ it is testified in our said court here, that the said _____ runs up and down, and secretes himself in the county of _____ therefore, it is commanded to the sheriff of _____ that he take the said _____ if, &c. and him safely keep, so that he may have, &c. on _____ next after _____ to satisfy the said _____ of the said £_____ residue of the damages aforesaid, at which day, before the said lord the king, at Westminster, comes the said _____ in his proper person, and the sheriff of _____ aforesaid returns, that the said _____ is not found in his bailiwick, whereupon, on behalf of the said _____ it is sufficiently testified in our said court of the said lord the king, before the king himself, that the said _____ runs up and down, and secrets himself in the county of _____ therefore, it is commanded to the sheriff of _____ that he take the said _____ if, &c. and him safely keep, so that he have, &c. on _____ next after _____ to satisfy the said _____ of the residue of the damages aforesaid, in form aforesaid, the same day is given to the said _____, there, &c.

Our lord the king sent to the sheriff of _____ his writ close in these words, to wit, George, (&c.) to the sheriff of _____, greeting: Whereas, we heretofore commanded our sheriff of _____, that of the goods and chattels, which were of _____, deceased, at the time of his death, in the hands of _____, and _____ his wife, executrix of the last will and testament of the said _____, deceased, in his bailiwick, he should cause to be made as well £_____ which _____, administratrix of all and singular the goods and chattels, rights and credits of _____, deceased, at the time of his death, who died intestate, had in our court before us at Westminster, recovered against them by occasion of the not performing of certain promises and undertakings made by the said _____ in his life-time to the said _____ in his life-time, as also _____ shillings, and £_____ which were adjudged to the said _____ in our said court before us, for her costs and charges by her about her suit in that behalf expended, whereof the said _____ were convicted, as appeared to us of record, if they had so much in their hands to be administered, and if they had not so much, then the said _____ shillings, and £_____ of the proper goods and chattels of the said _____ and _____, and that he should have that money before us at Westminster, at a certain day now past, to be rendered to the said _____, for her damages, costs, and charges aforesaid; and our said sheriff of _____ at that day returned to us that the said _____ and _____ had no goods or chattels in his bailiwick, which were of the said _____ at the time of his death in their hands, to be administered, whereof he could cause to be made the said £_____ of damages aforesaid, and _____

No. 7.

Entry of scire fieri inquiry against baron and feme, executrix; *fi. fa. de bonis testatoris ei, &c. et si non, &c. costs, de bonis propriis.* At the suit of an administratrix.

shillings, and £—— of costs and charges aforesaid, or any part thereof, and that the said —— and —— had no goods or chattels of their own proper goods and chattels in his bailiwick, whereof he could cause to be made the said —— shillings, and £—— of costs and charges aforesaid, or any part thereof; whereupon, on the behalf of the said —— it was sufficiently testified in the court before us, that the said —— and —— had in the county of —— sufficient goods and chattels, which were of the said —— at the time of his decease in their hands, to be administered, whereof the said £—— and —— shillings, and £—— might be caused to be made, and it was further testified in our said court before us, that the said —— and —— had in the said county of —— sufficient of their own proper goods and chattels; whereof the said —— shillings and £—— might be caused to be made, we, therefore, commanded our sheriff of —— that of the goods and chattels which were of the said —— at the time of his death in the hands of the said —— and ——, in his bailiwick, he should cause to be made, as well the said £——, as the said —— shillings, and £—— if they had so much in their hands to be administered, and if they had not so much in their hands, then the said —— shillings, and £—— of their own proper goods and chattels, and that he should have that money before us at Westminster, at a certain day also now past, to be rendered to the said —— for her damages, costs, and charges aforesaid; and our said sheriff of —— at that day returned to us, that by virtue of the said writ to him directed, he had caused to be made of the proper goods and chattels of the said —— the said sum of —— shillings, and £—— for the said costs and charges, which money he had ready to render, as in the said writ he was commanded: And he did further certify, that the said —— and —— had not any goods and chattels, which were of the said —— at the time of his death in their hands, to be administered within his bailiwick, whereof he could cause to be made the said sum of £—— of damages aforesaid, or any part thereof, and because the said returns are conceived to be in delay of the execution of the damages aforesaid, and also for that in our said court before us, on behalf of the said —— it is sufficiently testified that divers goods and chattels, which were of the said —— at the time of his death, have since the death of the said —— come to the hands and possession of the said —— and —— to be administered, which goods and chattels the said —— and —— have sold and wasted, and have converted and disposed of that money thereupon received to their own proper use, and that the residue of the goods and chattels, which were of the said —— at the time of his decease, have been eloiigned by the said —— and —— to places unknown to the said —— and by the said —— and —— converted to their own proper use, with intent that the execution of the damages aforesaid might not be made, we, being unwilling that those things, which in our said court before us have been rightly acted or adjudged, should be rendered void by art or deceit, command you, that of the goods and chattels which were of the said —— at the time of his decease in the hands of the said —— and —— to be administered in your bailiwick, you cause to be made the said sum of £—— of damages aforesaid, if you can levy the same, and that you have the money thereupon levied before us at Westminster, on —— next after ——, to be rendered to the said —— for her damages

aforesaid, and if the said sum cannot be thereupon levied, then if it shall appear to you by inquisition, on the oath of good and lawful men of your bailiwick in this behalf to be taken, or by any other methods whereby you may the better understand or certify that the said _____ and _____ his wife, have sold, eloigned, wasted, or converted, and disposed to their own proper use, goods and chattels, which were of the said _____ at the time of his decease in their hands, to be administered to the value of the said £_____ of the damages aforesaid or any part thereof, that then, by good and lawful men of your bailiwick, you make known to the said _____ and _____ that they be before us at Westminster, on _____ next after _____ to shew if any thing they have, or know, to say for themselves, why the said _____ ought not to have her execution against them for the said £_____ for damages aforesaid to be levied of the proper goods and chattels of the said _____ and _____ if it seem expedient, &c. and further to do and receive what our said court before us shall thereof then and there consider in this behalf, and have there then the names of those by whom you shall make known to them, and this writ. Witness, (&c.)

At which day, before our lord the king at Westminster, came the said _____ in her proper person, and the sheriff, to wit, _____ returned the said writ to him in form aforesaid directed, in manner and form following, to wit, that the said _____ and _____ had not any goods or chattels, which were of the said _____, deceased, at the time of his death, in their hands, to be administered in his bailiwick, whereof he could cause the said £_____ of damages aforesaid, or any part thereof, to be made, and the said sheriff likewise returned a certain inquisition taken at the _____, in the county of _____, on the _____ day of _____, in the _____ year of the reign of our sovereign lord George the Fourth, now king of the United Kingdom of Great Britain and Ireland, before the said sheriff by virtue of the said writ to him thereupon directed, on the oath of twelve good and lawful men of his bailiwick, whereby it was found that several goods and chattels, which were of the said _____ at the time of his death, had come to the hands and possession of the said _____ and _____, to be administered to the value of the said £_____ of damages aforesaid, which said goods and chattels they had sold, eloigned, wasted, converted, and disposed to their own proper use, and the said sheriff likewise returned that the said _____ and _____ had not any thing in his bailiwick, whereby, or by which he could make known to them, &c. and that they, or either of them, were not found in the same, and they did not come, nor did either of them come; therefore, as before, it is commanded to the sheriff, that by good and lawful men of his bailiwick, he make known to the said _____ and _____, that they be before our lord the king at Westminster, on _____ next after _____, to shew if any thing they have, or know, to say for themselves, why the said _____ ought not to have her execution against them of the said £_____ for her damages aforesaid, to be levied of the proper goods and chattels of the said _____ and _____, if, &c. and further, &c. the same day is given to the said _____, at the same place, at which day, before our said lord the king at Westminster, came the said _____ in her proper person, and the said sheriff, as before, returned, that the said _____ and _____ had not any thing in his bailiwick, whereby, or by which, he could make known to them

DEVASTAVIT; FORMS. DIMINUTION.

and that they were not, nor was either of them, found in the same, and the said ——— and ———, although at that day solemnly demanded came not, nor did either of them come, but they made default; it is, therefore, considered, that the said ——— have her execution against the said ——— and ——— of the said £—— for her damages aforesaid, to be levied, of the proper goods and chattels of the said ——— and ———, by the default of the said ——— and ———, &c.

DEVESEE.

Statute 3 *W. & M.* c. 14, made perpetual by stat. 6 & 7 *W.* III. c. 14. is so far practical, as that it vacates wills fraudulent against creditors, and enacts, that "debt or bond may be maintained against the heir at law and devisee of the obligor of such bond, and such devisee shall be liable and chargeable for a false plea, by him pleaded, in the same manner as any heir should have been, for any false plea by him pleaded, or for not confessing the lands or tenements to him descended." And by s. 7, "every devisee made liable by the act shall be liable and chargeable in the same manner as the heir at law by force of the act, notwithstanding the lands, tenements, and hereditaments, to him devised, shall be aliened before the action brought." See title *HEIR*.

DIES DATUS, A day given.

What.

Where day is given before the count or declaration, it is called *dies datus*; when after, it is called imparlance. This day was formerly given by consent; *prece partium*, at the prayer of the parties. *Clapham v. Sir John Lenthall, Hardr. 365.*

DIES NON, Dies non juridici. Non-judicial days.

Which.

These are, the second day of February, or the Purification; Ascension-day; and St. John the Baptist; and occurring in term time, no sittings are held thereon in Westminster Hall; and an award of judicial process, or entry of a judgment upon such a day is void. *Bedoe v. Alpe, Sir W. Jones, 156.*

But bail above may be put in. *Baddely v. Adams, 5 T. R. 170;* and such a day is considered as a day for such business as is transacted at the judges' chambers. *Id.*

DILATORY PLEAS.

These are such as are pleaded for the sake of delay. See titles *ABATEMENT. ABIDING BY PLEA. DELAY. PLEA. PLEADING.*

DIMINUTION, In Error; Alleging Diminution in Error.

What.

See title *CERTIORARI.*

Where the plaintiff or defendant, on an appeal to a superior court, alleges, that the record of the proceedings below is incomplete, either by the want of an original writ, or of a warrant of attorney, or of some other matter necessary to render the record perfect or complete; this is called alleging diminution.

To allege diminution, seems therefore to be the assigning of defects in the record sent or returned from below, for error, and praying a writ to the justices of C. P. *e. g.* who certified the record before, to certify the whole thereof.

On alleging diminution in the record, a writ of *certiorari* issues to certify the record; but for the law and practice thereon, see title CERTIORARI.

Diminution cannot be alleged of what is fully certified. *Wet-tenhall v. Sherwin*, 2 *Lev.* 206. 1 *Nels. Abr.* 658; or what is contrary to the record which is certified, 1 *Rol. Abr.* 764. *Rowe v. Power*, *ex dim.* *Boyse and Another*, in error, *Dom. proc. die.* 8 Mart. 1803, cited 2 *Tidd*, 1212, where are also cited *contra*, 1 *Bulst.* 181. 2 *Lil. Abr.* 422. 1 *Salk.* 49. *Lib. Ent.* 226. 245. 556. 559. 565; but see the authorities cited *contra*, 2 *Sid.* 1074. n. and it cannot be alleged upon a writ of error, brought on a judgment in any inferior court. *Hale v. Clare*, 1 *Salk.* 266; but this rule extends not to Wales, *Id.* and the cases cited in the margin.

PRACTICAL DIRECTIONS,

OF ALLEGING DIMINUTION ON ERROR FROM K. B. TO EXCHEQUER CHAMBER.

The transcript being complete, the same is delivered over to the clerk of the errors in the Exchequer Chamber. The defendant's attorney (in error) obtains of him, or of his deputy, (see TABLE OF OFFICERS AND OFFICES) a rule to allege diminution; pay 2s. 4d.; serve copy on the attorney for the plaintiff in error. The rule expires in eight days from that of the service of the copy, and if diminution be not duly alleged, the defendant in error, in strictness, may immediately make an affidavit of the service of a copy of the rule, and insist on a non pros being signed; but though the above be the practice, it is usual for the deputy clerk of the errors to send to the attorney for the plaintiff in error, or his agent in error, to apprize him, that a non pros will be signed, unless the diminution be alleged, and the fees duly paid. See title ERROR, FORMS subjoined; and if this be not done by the time specified, such non pros is then signed; the costs are taxed, and execution immediately issues. On the part of the defendant in error.

On being served with the copy of the rule to allege diminution, the plaintiff's attorney in error applies to the deputy clerk of the errors in the Exchequer Chamber, and producing the copy of the rule, alleges the matter of diminution counsel may have advised, and offers to pay the customary fees; these are 8d. per folio. On the part of the plaintiff in error.

In a very great majority of cases on writs of error, it may appear, that the step to be taken on the part of the plaintiff's attorney in error on this occasion, is limited to the payment of these fees.

The having done this, concludes the second term in proceeding on the writ of error. The rule to transcribe taken out the same term the writ of error is returnable, having concluded the first, the next step to be taken is, the assigning errors; and this concludes the third term. If the plaintiff in error do not assign errors, the defendant in error obtains a rule to be served upon the opposite attorney to compel that proceeding.

See title ERROR; Rule to assign Errors.

FORM.

Rule to allege
diminution.

Unless the plaintiff in the writ of error allege diminution within eight days next after notice hereof, given to the said plaintiff, or his attorney, a nonsuit will be entered.

_____, clerk of the errors.

For the Form in which diminution is alleged, see title ERROR, Assignment of error, post.

PRACTICAL DIRECTIONS,

OF ALLEGING DIMINUTION IN ERROR FROM C. P. TO
K. B.

It seems unnecessary under this title to say any thing in respect of alleging diminution, where error is brought in K. B. from C. P.; and the more particularly so, as the proceeding itself cannot take place, until after the record is removed from C. P.

PRACTICAL DIRECTIONS,

OF ALLEGING DIMINUTION IN ERROR BROUGHT IN
PARLIAMENT.

By the standing order of the House of Lords, if in any writ of error the plaintiff shall allege diminution, and pray a certiorari, the clerk shall enter an award thereof accordingly, and the plaintiff may before in nullo est erratum [in nothing is there any error, or there is no error] pleaded, sue forth the writ of certiorari in ordinary course, without special petition or motion to this house for the same, and if he shall not prosecute such writ, and procure it to be returned within ten days next after his plea of diminution put into this house, then unless he shall shew good cause for the enlarging the time for the return of such writ, he shall lose the benefit of the same, and the defendant may proceed as if no such writ of certiorari were awarded. Ord. dom. procer. die veneris 13th Dec. 1681.

And, "when diminution shall be alleged, and a certiorari prayed and awarded before in nullo est erratum pleaded, the clerk shall, upon request, give a certificate, that diminution is so alleged, and a certiorari prayed and awarded thereupon." Ord. dom. proc. die veneris, 21st 1717.

See further, title ERROR; Error in Parliament.

DIRECTION OF WRITS.

I. To sheriffs, or other officers where process is to be executed, &c.

II. To inferior courts.

No difficulty will occur in using the table subjoined.

Each county, city, and town being also a county, many peculiar jurisdictions, including the counties palatine, and Cinque Ports, are arranged alphabetically; and in the same line are intimated whether there be one sheriff or two, denoted by S. and S.S., the stile of the court, and the proper direction of the writ, &c.

Table of Persons or Officers of Counties, Cities, Towns, and of many Places having peculiar Jurisdictions.

Table,
Persons, &c.

- ABINGDON.** To the mayor, bailiffs, and burgesses of the borough of Abingdon, in the county of Berks, and to every of them.
- BATH.** To the mayor, recorder, and aldermen, justices of our city of Bath, in the county of Somerset, and to every of them.
- BEDFORDSHIRE.** S.
- BEDFORD.** To the mayor, aldermen, burgesses, and recorder of the town of Bedford, in the county of Bedford.
- BERKSHIRE.** S.
- BERWICK-UPON-TWEED.** To the mayor and bailiffs of our borough of Berwick-upon-Tweed.
- BEVERLEY.** To the mayor, aldermen, and burgesses of the town of Beverley, in the county of York.
- BRISTOL, Court.** To the mayor, aldermen, and sheriffs of the city of Bristol, and to the mayor and constables of the staple of the same city, and also to the bailiffs of the mayor and commonalty of the same city of Bristol of their court of Tolsey, and to the bailiffs of the said mayor and commonalty of the same city of their court of Pie-powder, and to every of them,
- BRISTOL. S. S. City.** See case cited at the end of this Table,
- BUCKINGHAM.** To the bailiff and burgesses of the town of Buckingham, in the county of Buckingham.
- BUCKINGHAMSHIRE.** S.
- BURY ST. EDMOND.** To the mayor, recorder, and burgesses of the borough of Bury St. Edmund, in the county of Suffolk.
- CAERMARTHEN, Court of Great Sessions.** To our justices of the Great Sessions of our county of Caermarthen.
- CAERMARTHEN.** To the mayor or recorder, and town clerk of the borough court of Caermarthen.
- CAMBRIDGESHIRE.** S.
- CAMBRIDGE.** To the mayor and bailiffs of the town of Cambridge,
- CANTERBURY, Court.** To the steward of the liberty of ———, by Divine Providence Archbishop of Canterbury, in the court of his palace, within the city of Canterbury.
- CANTERBURY, City.** To our sheriff of our city of Canterbury.
- CHESTER, County Palatine.** To our chamberlain of our county palatine of Chester, or his deputy there, greeting.
- CHESTER.** To our sheriffs of our city of Chester. And see cases at the end of this Table.
- CINQUE PORTS.** To the constable of the Castle of Dover, or to his deputy.
- CORNWALL.** S.

DIRECTION OF WRITS.

Table,
Persons, &c.

- CORONER.** To the coroner of our city of London.
- CORONERS.** To the coroners of our county of ———
- COVENTRY.** S. S. To our sheriffs of our city of Coventry.
- CUMBERLAND.** S.
- DERBYSHIRE.** S.
- DEVONSHIRE.** S.
- DORSETSHIRE.** S.
- DURHAM.** To the reverend father in God, ———, by Divine permission, lord bishop of Durham, or to his chancellor there, greeting, &c.
Instead of "our county palatine," say, "your bishopric."
- ELY.** To our trusty and well beloved ———, our chief justice assigned to hold the sessions of pleas within the liberty or royal franchise of the honourable and right reverend father in God, ———, by Divine permission, lord bishop of Ely, within the isle of Ely, in the county of Cambridge, and to ———, chief bailiff of the said bishop, within the liberties of the said isle, and to each of them, greeting.
- ESSEX.** S.
- EXETER.** To the mayor and bailiffs of our city of Exeter, in the county of Devon, and to the bailiffs, citizens, and provosts of the same city.
- EXETER, City.** To our sheriff of our city of Exeter.
- GLOUCESTERSHIRE.** S.
- GLOUCESTER, Court.** To the mayor, aldermen, and sheriffs of our city of Gloucester.
- GLOUCESTER.** S. S. *City.* To our sheriffs of our city of Gloucester.
- HAMPSHIRE.** S.
- HEREFORDSHIRE.** S.
- HEREFORD.** To the mayor, aldermen, and citizens of the city of Hereford.
- HERTFORDSHIRE.** S.
- HERTFORD.** To the mayor and capital burgesses of the borough of Hertford, in the county of Hertford, and also to the steward of our court of record there.
- HUNTINGDONSHIRE.** S.
- HUNTINGDON.** To the mayor, aldermen, and burgesses of the borough of Huntingdon, in the county of Huntingdonshire.
- KENT.** S.
- KINGSTON-UPON-HULL, Court.** To the mayor and sheriff of our town, and county of Kingston-upon-Hull, in the county of York.
- KINGSTON-UPON-HULL, City.** To our sheriff of our town and county of Kingston-upon-Hull.
- KINGSTON-UPON-THAMES.** To the bailiffs and steward of our court of our town of Kingston-upon-Thames, and in

DIRECTION OF WRITS.

487

Table,
Persons, &c.

the absence of the said steward, to the bailiffs and recorder of the same town, or any two of them.

KING'S LYNN. To the mayor and recorder of our town or borough of King's Lynn, in the county of Norfolk.

LANCASTER. *S. County Palatine.* To our chancellor of our county palatine of Lancaster, or his deputy there.

LEOMINSTER. To the bailiff and capital burgesses of Leominster.

LEICESTERSHIRE. S.

LINCOLNSHIRE. S.

LINCOLN, Court. To the mayor, sheriffs, and citizens of our city of Lincoln.

LINCOLN, S. S. City. To our sheriffs of our city of Lincoln.

LITCHFIELD, Court. To the bailiffs, burgesses, and citizens of our city of Litchfield.

LITCHFIELD, City. To our sheriff of our city of Litchfield, and county of the same city.

LIVERPOOL. To the mayor and bailiffs of our borough of Liverpool, in the county of Lancaster.

LONDON. S. S.

LONDON, Mayor's Court. To the mayor, aldermen, and sheriffs of the city of London, greeting.

LONDON, Sheriff's Court. To the sheriffs of the city of London.

LUDLOW. To the recorder, bailiffs, and capital burgesses of our borough of Ludlow, in the county of Salop.

MARSHAL OF K. B. To the marshal of our prison of the Marshalsea before us.

MARSHALSEA COURT. To the judges of our palace court of Westminster, and to each of them, greeting.

ST. MARTIN'S LE GRAND. To the steward of the dean and chapter of the collegiate church of St. Peter, Westminster, of the court of their liberty or precincts of St. Martin's the Great, in London, and to the constables there.

MIDDLESEX. S.

MONMOUTHSHIRE. S.

MONMOUTH. To the mayor and bailiffs of our town of Monmouth.

NEWBURY. To the mayor, aldermen, and burgesses of our borough of Newbury, in the county of Berks.

NEWCASTLE-UPON-TYNE. To our sheriff of our town and county of Newcastle-upon-Tyne.

NORFOLK. S.

NORTHAMPTONSHIRE. S.

NORTHAMPTON. To the mayor and bailiffs of our town and borough of Northampton, in the county of Northampton.

NORWICH, Court. To the mayor, aldermen, and sheriffs of our county of the city of Norwich.

DIRECTION OF WRITS.

NORWICH, City. S. S. To our sheriffs of our city of Norwich.

NOTTINGHAMSHIRE. S.

NOTTINGHAM, Court. To the mayor and burgesses of our town of Nottingham.

NOTTINGHAM, Town. To our sheriffs of our town and county of Nottingham.

OXFORDSHIRE. S.

OXFORD. To the mayor and bailiffs of our city of Oxford, in the county of Oxford.

PALACE COURT. See **MARSHALSEA COURT** in this Table.

POOLE. To our sheriff of our town and county of Poole.

PORTSMOUTH. To the mayor, aldermen, and burgesses of our borough of Portsmouth, in the county of Southampton.

RUTLANDSHIRE. S.

SHROPSHIRE. S.

SOUTHAMPTON, Court. To the mayor and bailiffs of our town of Southampton.

SOUTHAMPTON, Town and County. To our sheriff of our town and county of Southampton.

SOUTHWARK, Borough Court of Southwark. To the steward of the court of the liberty of the mayor and commonalty, and citizens of the city of London, of their town and borough of Southwark, in the county of Surrey, and also to the bailiff of the same liberty.

SOMERSETSHIRE. S.

STAFFORDSHIRE. S.

STEPNEY. To the steward of our court of record, within the manors of Stepney and Hackney, in the county of Middlesex, hamlets, and liberties of the same, and also to the high bailiff of the said liberty, and to either of them.

SUFFOLK. S.

SURREY. S.

SUSSEX. S.

TAUNTON. To the bailiffs of the reverend father in Christ, ———, by Divine permission lord bishop of Winchester, of his liberty of Taunton, and Taunton Dean, in the county of Somerset.

THETFORD. To the mayor and recorder of our borough of Thetford, in the county of Norfolk.

WARWICKSHIRE. S.

WELLS. To the steward or bailiff of our court of our pleas, granted to the reverend father in Christ, ———, lord bishop of Bath and Wells, held at the Guildhall within the city and borough of Wells, in the county of Somerset.

WESTMORELAND. S.

WHITECHAPEL, Court. To the steward of our court of record within the manors of Stepney and Hackney, in the

DIRECTION OF WRITS. DISCONTINUANCE.

489

county of Middlesex, the hamlets and liberties of the same, and also to the prothonotary of the same court.

Table,
Persons, &c.

WILTSHIRE. S.

WOODSTOCK. To the mayor of the town of New Woodstock, in the county of Oxford.

WORCESTER, *Court*. To the mayor, recorder, and aldermen of our city of Worcester, and to every, &c.

WORCESTER, *City*. To our sheriff of our city of Worcester.

WORCESTERSHIRE. S.

YORKSHIRE. S.

YORK. S. S. *City*. To our sheriffs of our city of York.

YORK, *Court*. To the mayor, aldermen, and sheriffs of our city of York.

Testatum capias directed to the coroner, where one of the two sheriffs of Bristol was party to the suit, held irregular, for it ought to have gone to the other. *Letson v. Bickley and Others*, 5 M. & S. 144.

An *alias capias* directed to the sheriffs of the city of Chester, instead of the chamberlain of the county palatine, directing him to issue his mandate to the sheriffs, is irregular, and may be set aside at the instance of the defendant. *Bracebridge v. Johnson*, E. 59 G. III. C. P. 1 Tidd, 172.

DISCHARGE. *Discharge of Prisoner out of Custody.*

And it seems that without the intervention of his attorney, the plaintiff may discharge a defendant out of custody. See title ATTORNEY, page 137, *ante*; and also *Martin v. Francis*, 1 Chit. R. 241.

FORM.

[*Court*.]

(*Title cause*.)

Please to discharge ———, the above named defendant, out of your custody, the debt and costs being satisfied.

Your's, &c.

———, Attorney

To the ———.

for the above-named plaintiff.

DISCONTINUANCE.

The breaking off; a chasm in; the proceedings.

What.

This title may admit of four divisions, although the older books seem to have mingled all the points; perhaps, as they amounted to the same thing: 1. An interruption, breaking off, or discontinuance of, the possession of land: 2. An interruption, chasm in, or discontinuance of, the process: 3. The like, of or in the pleadings: 4. The actual, as distinguished from the virtual discontinuance of the suit by negligence in doing, or omission to do what practice requires to be done in order to the legal conducting of a suit.

The first division is foreign to this compilation, and as to the last, it is matter of office attention, and therefore falls under the PRACTICAL DIRECTIONS and FORMS subjoined.

See titles AMENDMENT, *Continuances*. CONTINUANCE, *ante*.

Of discontinu-
ance of process.

Where an action long depending, and continued from one term to another, the continuances must be all entered, otherwise there will be a discontinuance, whereupon a writ of error may be brought. 1 *Nels. Abr.* 660.

It is said, that a discontinuance is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend, but the plaintiff must begin again by suing out a new original, (writ) usually paying costs to his antagonist. 3 *Com.* 296.

How cured.

Discontinuance is cured by the appearance of the party, by stat. 32 *H. VIII. c.* 30. in penal as well as in civil actions. *Humble v. Bland*, in error, 6 *T. R.* 255.

If a discontinuance be after a verdict, or on a writ of inquiry, the plaintiff cannot discontinue, if the defendant will not consent. *Stephens v. Etherick*, *Carth.* 86.

A discontinuance of an action or suit is not a perfect discontinuance until it be entered upon the roll, see Nos. 1 and 2, FORMS subjoined; for the entry of it makes part of the record, and a record cannot be discontinued but by matter of record; but if this discontinuance be to be pleaded, it is not necessary to plead the entry of it; for it shall be intended that it is entered without shewing it. 1 *Lill. P. R.* 644.

Where there are two defendants, one pleads to issue; to the other's plea there is a demurrer; the issue is tried, and a verdict against the defendant; he is out of court, and no day shall be given to a defendant against whom a verdict is found, for he hath no day in court to plead any thing. But the day is to be given to the other party, who is to plead to the demurrer. *Lakins v. Sir John Lamb and Holt*, *Cro. Car.* 235. *Case*, 17. 235.

Trespass for two things, verdict for one only; it is a discontinuance. 1 *Lil. P. R.* 646.

Of discontinu-
ance in pleading.

As this division is proper to pleading, it need not be extended. The principle will be seen by a few cases.

Where the defendant concluded his plea in disability, and the plaintiff his replication in bar, all is discontinued. *Biase v. Harcourt*, *Carth.* 138.

In an action on the case, the defendant concluded his plea in abatement, and the defendant demurred as to a plea in bar: it is a discontinuance. *Carter v. Davis*, 1 *Salk.* 518. *Lug v. Goodwin*, 1 *Ld. Raym.* 393.

As to whether demurrer to a demurrer be a discontinuance. *Comb.* 323.

If there are three replications, and the defendant demurs to one of them, and gives no answer to the other two, and the plaintiff joins in demurrer, it is a discontinuance. *Hancocke v. Prowd*, 1 *Saund.* 338, 339.

All discontinuances and miscontinuances whatever, as well before as after verdict; *Halmen v. Collins*, *Cro. Eliz.* 489; *Smith v. Bower*, *Cro. Jac.* 528; *Lakins v. Sir John Lamb and Holt*, *Cro. Car.* 236; and as well on the part of the plaintiff as on the part of the defendant, or other negligence of the parties, their counsellors, or attorneys, are cured after a verdict, per statute

32 H. VIII. c. 30. *Smithson v. Garth*, 3 *Lev.* 325. *Randall v. Brees*, *Id.* 39, 40. *Danv. Abr.* 352. See stat. 36 E. III. c. 15. Also *Richards v. Brown*, 1 *Doug.* 115. But imperfect verdicts are not helped by this statute. *Gomersell v. Gomersell*, 2 *Leon.* 194. *Fynmore v. Sanky*, *Cro. Eliz.* 133. *Graves v. Morley*, 3 *Lev.* 55. 1 *P. R.* 645. and the statute 32 H. VIII. extends to all discontinuances, as well of court as process in inferior as superior courts. *Walwin v. Smith*, 1 *Salk.* 177. In the margin of this case it is said, "*contra*, 2 *Saund.* 258."

They are aided by the statute of jeofails, as well after verdict as before, and as well where there be two verdicts in two several courts upon one declaration. 1 *Lill. P. R.* 645. See title JEOPAIL.

It seems that leave of the court is always to be obtained in every case of discontinuance, whether the defendant consent or not; but in many cases the consent of the defendant is also necessary, and in all upon payment of costs. See *Whitmore v. Williams*, 6 *T. R.* 765, where it was ruled that appointment to tax costs, and payment of the same, was necessary to give effect to the rule to discontinue. See also *Molling* and others, assignees, &c. *v. Buckholtz*, 3 *M. & S.* 153. *S. P.*

When plaintiff may discontinue.

On the 6th February, a rule to discontinue the action on payment of costs was obtained by the plaintiff; the costs were not taxed until the 11th March: Held, that when the costs were taxed, and the judgment of discontinuance entered up, it related back to the day when the rule for discontinuance was obtained; and that the action was to be considered discontinued from that time. *Brandt v. Peacock*, 1 *B. & C.* 649.

But an executor is not liable to costs upon a discontinuance, unless he have knowingly brought a wrong action, or otherwise been guilty of a wilful default. *Per Cur. T.* 44 G. III. *K. B.* *Wright v. Jones*, *H.* 45 G. III. *K. B.* 2 *Fidd.* 993.

The plaintiff may discontinue before or after declaration, and after issue joined; but this must be by leave. See *Imp. C. P.* 744.

The plaintiff may discontinue after the entering a special verdict (*see below*); but it appears to have been doubted whether the defendant should have his costs, no verdict having been given. *Earl of Oxford v. Waterhouse*, *Cro. Car.* 575, *pl.* 18.

After judgment on demurrer (but not entered on record), and error brought, and bail thereon, the court refused to make a rule to discontinue without payment of the costs in error. *Pym v. Warren*, *Bar.* 169. As to discontinuing after judgment on demurrer, see also *Jones v. Pope*, 1 *Saund.* 35, b. *Hegman v. Gerard*, 1 *Lev.* 226. *Martin v. Delboe*, *ibid.* 298.

The leave, in case of judgment after demurrer seems to be discretionary with the court. See *Turner v. Turner*, 1 *Salk.* 1792. *Id. Raym.* 856. Notwithstanding these latter cases, *contra*, the former amendments are allowed on payment of costs; and even an administrator must pay costs on a discontinuance. *Hall, administrator, v. Norton*, *ibid.*

Replevin cannot be discontinued. *Long v. Buckeridge*, 1 *Str.* 106, 112.

Where not.

After a general verdict, or on a writ of inquiry, the plaintiff cannot discontinue without the defendant's consent. *Stephens v. Etherick*, *Carth.* 86. See also *Comb.* 170, 1.

Nor after a special verdict, in order to adduce fresh proof in contradiction to the verdict. *Roe, d. Gray v. Gray*, 2 *Bl.* 815.

PRACTICAL DIRECTIONS, K. B. C. P.

Judgment not having been signed, apply, as of course, at the clerk of the rules', or secondary's, for a rule to discontinue. Be prepared to mention at what period of the cause the application is made; pay 6s. 6d. As defendant's costs are to be paid, obtain the master's or prothonotary's appointment on the rule; serve copy of the rule and appointment on the defendant's attorney; attend the appointment, and the master or prothonotary immediately proceeds to tax the costs, whether the defendant's attorney be or not present. Pay the amount immediately to the defendant's attorney.

But if there be judgment on demurrer, the rule cannot be had without motion; it is of course nisi; make out a motion paper; indorse parties names in the usual way, "To move for a rule to shew cause why the plaintiffs should not be at liberty to discontinue on payment of costs;" give same to counsel or serjeant, fee 10s. 6d. Apply in the evening at the clerk of the rules' or prothonotary's; pay for rule, 6s. 6d.; serve copy. On the day mentioned in the rule be ready with an affidavit of service; instruct counsel or serjeant "To move to make the within rule absolute," and if ordered, obtain rule in the evening; pay 6s. 6d.; get appointment, and proceed as before. In vacation, these rules may be obtained by summons.

Then enter the discontinuance on the roll. See No. 1, and 2, FORMS subjoined; docket and carry in same. See title DOCKETING-ROLL.

The proceedings C. P. are the same as K. B. mutatis mutandis.

FORMS.

No. 1.
Entry of discontinuance by bill.

Afterwards, to wit, on ——— next after ———, in ——— term, in the ——— year of the reign of our lord the now king, before our said lord the king at Westminster, come the said ———, by their attorney aforesaid, and the said ——— (*plaintiff*), did not then and there prosecute his said bill against the said ——— with effect, but voluntarily permitted his suit to be discontinued. Therefore, it is considered that the said ——— (*plaintiff*), take nothing by his said bill, but that he and his pledges to prosecute be in mercy, &c. And it is further considered by his majesty's court here, that the said ——— do recover against the said ——— (*plaintiff*), for his costs and charges by him laid out about his defence in this behalf, by the court of our said lord the king, now here adjudged to the said ———, and with his assent, according to the form of the statute in such case made and provided: and that the said ——— have execution thereof, &c.

No. 2.
The like by original.

It is recorded by the court, on ——— in ——— term, in the ——— year of the reign of our lord the now king, that the plea aforesaid hath not a day of continuance by the same roll, beyond the aforesaid ———, therefore let the plea aforesaid be discontinued at the request of the said ——— (*plaintiff*), &c.

DISSEISIN.

What

A wrongful putting out of him that is seised of the freehold, 1 *Inst.* 177. See 3 *Comm.* 187.

Several statutes have given double and treble damages upon disseisins in particular cases. See *Pilfold's case*, 10 Co. 115; but as ejectment, and the action for mesne profits have, in a great degree, superseded the older forms of real and possessory actions, this proceeding ceases to be practical.

Treble damages in disseisin.

By what superseded.

DISTRESS. See title **REPLEVIN**.

DISTRINGAS. *Writ of Distringas*.

The title by which several writs are known in practice; none of which seem to have any final operation, but all issuing for the purpose of enforcing some act, as an appearance in obedience to the process of the court, by a defendant; or by jurymen; or a performance of some duty; as, by a sheriff, to bring in a body, &c.

What.

This writ takes its name from the operative words of the Latin original; viz. *distringas*, "that you distrain."

This title is here treated under the following sections.

- I. *Distringas* against a Peer. Practical Directions, K. B.
- II. *Distringas* against a Member of Parliament. Practical Directions, K. B.
- III. Practical Directions as to two preceding sections. C. P.
- IV. *Distringas* against the Sheriff.
- V. *Distringas* on an original *quare clausum fregit*. Cases.
- VI. Practical Directions.
- VII. *Distringas Juratores*; or that writ by virtue of which the sheriff, or other officer is commanded to distrain those who are to "make" a jury.
- VIII. Practical Directions.
- IX. Forms.

I. DISTRINGAS AGAINST A PEER, &c.

By R. T. 1753, Exchequer, where issues shall be obtained upon any writ of *distringas* to be issued out of the Court of Exchequer, the plaintiff in such writ may immediately after the return thereof, apply by motion to that court, for increasing issues upon further process to be issued between the parties, which said issues shall be increased from time to time, at the discretion of the court. *Lambe v. Blessington* (Earl), 5 Price, 639.

And where a common issue of 40s. had been levied under a *distringas* on a *venire*, that court increased the issues on an application for a second *distringas*, to 100l., and on a third to 300l., the amount of the debt being 690l., due on a bond for that sum, and interest. *Id. ib.*

PRACTICAL DIRECTIONS, K. B.

See the titles of the practice of which *distringas* is a part, as **ATTACHMENT AGAINST SHERIFF. JURY. MEMBER OF PARLIAMENT. PEER. QUARE CLAUSUM FREGIT. SHERIFF.**

If on being duly summoned, the peer shall not within four days after service of such summons, enter an appearance thereto, the filazer, K. B., on having a proper precipe delivered to him, makes out a writ of *distringas*. See No. 1, FORMS subjoined. Pay according to the length,

DISTRINGAS; I. Distringas against a Peer; PR. DI.

seal, 7d. Obtain warrant from the sheriff's office; pay 2s. 6d. By virtue of this writ, and the warrant thereon, the sheriff's officer levies 40s.; pay officer 10s. On the quarto die post of the return of this writ, search again for appearance, and finding none, get the first writ returned; pay 4d. On this writ the filazer makes out another, or alias writ, and the court may be moved on the morrow "to increase the issues;" counsel, 10s. 6d. This is a motion of course, and being discretional, the court generally directs the levy to be increased sufficiently to cover debt and costs.

The clerk of the rules draws up the rule; carry same to the sheriff's office, and obtain warrant on the alias distringas.

The officer levies the amount mentioned in the rule. Should not the full amount of debt and costs have been levied, on the quarto die post of the return of the alias distringas, search as before for the appearance, and if none, get the writ returned; pay 4d. as before; the filazer makes out a pluries; and on this move in like manner that the issues may be still further increased; get warrant; let levy be made, &c. as before, and proceed by issuing writ, and these by motion, as above mentioned, until the issues or chattels already distrained shall be sufficient to cover the full amount of debt and costs.

Stat.

Having proceeded thus far, the issues or chattels may, under statute 10 G. III. c. 50. be sold. This statute, intituled "An Act for the further preventing Delays of Justice, by reason of Privilege of Parliament," s. 3. after shortly reciting that the process by distringas is dilatory and expensive, enacts, that the court out of which the writ proceeds, may order the issues levied from time to time to be sold, and the money arising thereby to be applied to pay such costs to the plaintiff as the court shall think just, under all the circumstances to order, and the surplus to be retained until the defendant shall have appeared, or other purpose of the writ be answered. And s. 4. provides, that when the purpose of the writ is answered, that then the said issues shall be returned, or if sold, what shall remain of the money arising by such sale shall be repaid to the party distrained upon.

In order that the party may avail himself of the benefit of this act, an affidavit must be made, briefly stating the cause of action, and the proceedings therein; also the issuing the writ of distringas, the several returns thereto, and the non-appearance of the defendant; this affidavit will serve as brief or instructions to counsel, and it may be indorsed agreeably to No. 5, FORMS subjoined.

In the evening apply for the rule; pay 6s. 6d.; serve copy on the sheriff or his under sheriff, at the time of service shewing him the original rule.

On the day for shewing cause mentioned therein, be prepared with an affidavit of service. (See title MOTION, if necessary), which must also specify the shewing the original rule at the time of such service; annex the rule thereto; give this affidavit as instructions to counsel, to move to make the within rule absolute; apply at the clerk of the rules in the evening, as before; pay for same 6s. 6d.; serve copy on the sheriff at the same time, shewing the original.

The sheriff sells the issues or chattels, and brings the money into court; but should he not, attachment lies. See titles ATTACHMENT; ATTACHMENT AGAINST SHERIFF, if necessary.

Make out bill of costs, which the master taxes, and these being marked on the rule, are paid out of the money brought into court by the sheriff.

If the money be not brought into court, but retained by the sheriff, that officer pays the costs agreeably to the allocatur. But an appearance may be entered. See title PEER. Proceeding against a peer.

The distringas and sale of issues may be repeated so long as the defendant do not appear.

As the practice now stands, the money in court can only be liable to the costs of issuing the writs, &c., and the plaintiff benefits by the remedial measure pointed out by the statute no farther than the not having to pay his attorney from time to time for the several writs of distringas, &c. Perhaps, if any alteration in relation to proceeding against peers should be thought necessary, or still more conducive to the ends of justice, the extension, both at law and in equity, of the statute of the 45th Geo. III. c. 124, which allows the plaintiff in certain cases to appear for the defendant, having privilege of parliament, might be deemed simple, obvious, and adequate to possess the plaintiff of something more than a negative remedy for the unjust withholding of his just debt, especially if the personal service of the summons were held unnecessary.*

I have mentioned thus much upon a presumption that the act above mentioned does not extend to peers. See, however, Plaistow v. Raban, 5 Burr. 2726, as to the interpretation of the former act.

II. DISTRINGAS AGAINST A MEMBER OF PARLIAMENT, K. B. PRACTICAL DIRECTIONS.

The proceeding against a member of the House of Commons, so far as relates to this writ, is nearly the same. The form of the writ somewhat varies, and it needs not, as in the case of a peer it must, be made returnable as by original; unless, indeed, the proceeding by original be preferred.

If the proceeding be by bill, as is most usual, engross writ on parchment. No. 2, FORMS subjoined; the signer of the writs issues it; pay 1s. 8d.; seal, 7d.; warrant, 2s. 6d.; levy 10s. If the defendant have no goods in the county where the venue is laid, get the distringas returned nihil in that county, and issue a testatum thereon. No. 4, FORMS subjoined. Distress and sale, &c. may be repeated, as in the case of proceeding against a peer, as above mentioned.

Such a mode of proceeding, even against a member of the House of Commons, notwithstanding the highly beneficial statute above-mentioned, is necessary if the defendant cannot be personally served with the summons. The defendant may prevent all this litigation and vexatious expense by duly entering an appearance. See title MEMBER OF PARLIAMENT. Proceeding against a Member of Parliament.

III. AS TO THE TWO PRECEDING HEADS. C. P. PRACTICAL DIRECTIONS.

The proceeding by writ of distringas against a peer or member of parliament in C. P. although the previous steps be very different, is nearly the same, mutatis mutandis, as in K. B. But the writ of distringas must be examined with the bill at the filazer's office, previously to its being signed by him.

* In the former edition of this work the editor ventured to suggest the propriety of dispensing in this case with personal service of the summons; but it should seem, that if it were so held, the number of summonses served or left at the residence should be increased, and time enough allowed between

each service to make it quite probable that the peer must in the due course of things have had notice of the issuing the writ. But lest advantage should be taken of this extension of time, the practice should, in the case of actual personal service, remain undisturbed.

DISTRINGAS; PR. DI.; V. *Distringas* on Qu. Cl. Fr.

The FORM of the *distringas* subjoined might also serve in C. P., remembering that the return-day is general, and that "wheresoever, &c." is to be omitted; but it seems usual in that court to set out the whole cause of action as stated in the bill; and Mr. Serjeant Sellon, from 2 Crompt. 138, says, "that all the process thereon states the whole as in the original bill or writ filed." But contra, Imp. C. P. 566. See therefore No. 6, FORMS subjoined.

IV. DISTRINGAS AGAINST THE SHERIFF; LATE OR PRESENT.
PRACTICAL DIRECTIONS.

Distringas against the sheriff, to compel him to bring in the body of one who is, or who ought to be, in his custody; or for the purpose of compelling him to do his duty in any other proper case. This proceeding, with respect to compelling him to bring in the body, is in consequence of R. G. T. 31 G. III. 4 T. R. 379, superseded by that of Attachment. See title ATTACHMENT against sheriff; but if the proceeding by *distringas* shall be preferred; as where goods remain in the hands of the late sheriff unsold for want of buyers, it is indeed necessary; what is said respecting proceeding against a peer or member of parliament, will be applicable here, mutatis mutandis. See also page 90.

And *distringas* against the late sheriff, must lay four days exclusive in the sheriff's office; but it needs not be left there before the return, it being deemed sufficient to leave it on the return day. Per cur. H. 23 G. III. K. B. 1 Tidd, 330.

Although the proceeding by *distringas* against the late and present sheriff, be superseded as mentioned above, it will be obvious that no other proceeding can be adopted against a ministerial officer, who is also a peer: as, for instance, against the bishop of Durham. *Flight and others v. Stanley*, M. 44 G. III. 1 Tidd, 33. Bailiffs of liberties, and other persons having peculiar jurisdictions, may be proceeded against by *distringas* or by attachment, though this last is the proceeding now adopted. See, therefore, title ATTACHMENT.

But it should be observed, that *distringas* against the old sheriff is yet the proper remedy, where he has returned, that he has taken goods which remain in his hands for want of buyers. In this case a *distringas* issues directed to the new sheriff, commanding him to distrain the old, &c. until he sell the goods. 2 Saund. 47 l. n. 2. See FORMS, No. 13, subjoined; but see where this writ was set aside, and the plaintiff left to his remedy by action. *Clutterbuck v. Jones*, 15 East, 78. This was a case where levy had been made by the old sheriff; the goods had been returned unsold for want of buyers; a commission issued against the defendants; the goods were delivered up by the then sheriff to the assignees; after which the plaintiff issued this writ, directed to the new sheriff.

V. DISTRINGAS ON THE WRIT OF QUARE CLAUSUM
FREGIT; CASES.

The former practice in relation to this, is, by a late act, much modified.

By stat. 51 G. III. c. 124. s. 2. in all cases where the plaintiff shall proceed by original or other writ, and summons or attachment thereupon in any action, or against any person not having privilege of parliament, no writ of *distringas* shall issue for default of appearance, but the defendant shall be served personally with the summons or attachment, at the foot of which shall be

written a notice, informing the defendant of the intent and meaning of such service, to the effect following:

"C. D. (*naming the defendant*), you are served with this process, at the suit of A. B. (*naming the plaintiff*), to the intent that you may appear by your attorney in his majesty's court of ———, at Westminster, at the return hereof, being the ——— day of ———, in order to your defence in this action; and take notice, that in default of your appearance, the said A. B. will cause an appearance to be entered for you, and proceed thereon as if you had yourself appeared by your attorney."

And in case it shall be made appear to that court, or in the vacation to a judge of the court from which such process shall issue, or into which the same shall be returnable, that the defendant could not be personally served with such summons or attachment, and that such process had been duly executed at the dwelling-house or place of abode of such defendant; that then the plaintiff, by leave of the court or order of such judge, may sue out a writ of *distringas* to compel the appearance of such defendant; and that at the time of the execution of such writ of *distringas*, there shall be served on the defendant by the officer executing such writ, if he can be met with, and if he cannot then be met with, there shall be left at his dwelling-house or other place where such *distringas* shall be executed, a written notice in the following form:

"In the court of (*specifying the court in which the suit shall be depending.*) Between A. B. plaintiff and C. D. defendant, (*naming the parties*), take notice, that I have this day distrained upon your goods and chattels for the sum of forty shillings, in consequence of your not having appeared by your attorney in the said court at the return of a writ of ———, returnable there on the ——— day of ———; and that in default of your appearing to the present writ of *distringas* at the return thereof, being the ——— day of ———, the said A. B. will cause an appearance to be entered for you, and proceed thereon as if you had yourself appeared by your attorney.

"E. F."

(*The name of the sheriff's officer.*)

"To C. D. the above-named defendant."

And if such defendant shall not appear at the return of such original or other writ, or of such *distringas*, as the case may be, or within eight days after the return thereof, the plaintiff, upon affidavit being made and filed in the proper court, of the personal service of such summons or attachment, and notice written on the foot thereof, as aforesaid, or of the due execution of such *distringas*, and of the service of such notice as is by the said act directed on the execution of such *distringas*, as the case may be, may enter a common appearance for the defendant, and proceed thereon as if such defendant had entered his appearance, and that such affidavit or affidavits may be made before any judge or commissioner of the court out of, or into which such writ shall issue

DISTRINGAS; V. *Distringas on Qu. Cl. Pr.*

or be returnable, authorized to take affidavits in such court, or else before the proper officer for entering common appearances in such courts, or his lawful deputy, and which affidavit is to be filed *gratis*.

By s. 3. the provisions contained in stat. 19 G. III. c. 70. respecting actions in inferior courts, where the cause of action should amount to less than £10, shall, from the 1st November, extend to all actions in such courts where the cause of action shall amount to £15, exclusive of all such costs, charges, and expences as aforesaid, (except where the cause of such action shall arise or be maintainable upon or by virtue of any bill of exchange or promissory note, in which case the parties liable thereupon may be held to special bail, in such manner as if the act had not been made); and that so much of any act before the present act passed for the recovery of debts within certain districts and jurisdictions, which might have authorized the arrest and imprisonment of defendants where the cause of action amounts to less than £15, exclusive of such costs, charges, and expences as aforesaid, were by the said act from and after the 1st day of November repealed.

By s. 4. the act not to extend to Scotland or Ireland.

Stat. does not extend to counties palatine.

The statute regulating process by *summons* and *distringas*, does not extend to counties palatine. 5 *Taunt.* 71.

But it does to the court of Exchequer. *Id.* note.

It will thus be seen that, with reference to proceeding against persons not having privilege, the *distringas* on original *quare clausum fregit* is virtually though certainly not actually abrogated.

Many of the cases on this description of *distringas* which follow, have occurred since the passing of the act; those which occurred previously, are hardly altogether pertinent to the present practice; but as one or two of these contain some principle which, even under that practice, may be held applicable, I have noted them.

As to levy on one resident partner where other partners reside abroad.

If three partners (two of whom reside abroad, and one in England) be sued for a partnership debt, and the partner resident in England appear to the action, but refuse to appear for the partner resident abroad, the sheriff, under a *distringas* against the two partners, may take partnership effects, though paid for by the partner resident in England alone, to whom the partnership was largely indebted; and the court will not relieve him against such distress. *Morley v. Stomborn*, 3 B. & P. 254.

But where a plaintiff sues a defendant, who is out of the country, for a debt contracted here by his wife in his absence, and proceeds by *distringas*, the court will order the issues to be restored, and set aside that writ. *Greaves v. Stokes*, 1 *Taunt.* 415. See also *Wilson v. Spilsbury*, 3 *Taunt.* 145. *acc.*

Though a nice distinction seems to have been made in the following decision, and from which *Wilson v. Spilsbury* was distinguished, namely, a plaintiff who did not know at the time of giving credit, that the defendant was out of the realm, may proceed, notwithstanding his absence, to compel an appearance by *distringas*, provided the defendant, residing abroad carry on trade in England. *Gurney v. Hardenberg*, 1 *Taunt.* 487.

The rule R. G. T. 38 G. III. 1 B. & P. 312. as to issues on *distringas* in *quare clausum fregit*, seems to be virtually abrogated.

Where a defendant is abroad, a plaintiff may still (since stat. 51 G. III. c. 124) issue a *distringas* on service of the *venire facias*, for the purpose of compelling his appearance thereby, as he might have done before that act, but not for the purpose of enabling the plaintiff to enter an appearance for him, so that he may proceed thereon to final judgment as if the defendant himself had appeared. *Nicholson v. Bownass*, 3 *Price*, 263. S. P. *Dwerryhouse v. Graham*, *Id.* 266. n.

Where act does not alter the practice.

The Court of C. P. will not grant a *distringas* against a defendant who has gone abroad, without proof of his absenting himself with intent of avoiding process. *Renshaw v. Leame*; *Jordan v. Pello*, 5 *Taunt.* 703. and see *Jordan v. Bell*, 1 *Marsh.* 292.

Where *distringas* refused, C. P.

The court of Exchequer will not grant a *distringas* against a defendant who has not been served with process, other than by delivery of it to a person at whose house he had recently resided, unless it appear that he then lived there. *Horton v. Peake*, 1 *Price*, 309.

Where, Exchequer.

And service of *venire facias ad respondendum* by leaving it with a clerk of the defendants, at their counting-house is not sufficient to obtain a *distringas*, though, after several effectual calls made for the purpose of personal service. *M'Nabb v. Ingham*, 2 *Price*, 9.

An affidavit to obtain a *distringas* must not only state the deponent's belief that the defendant purposely absents himself to avoid process, but must also state facts, from which the court may see that his belief is well grounded. *Turner v. Wall*; *Down v. Crew*, 5 *Taunt.* 520. S. P. 1 *Marsh.* 267. S. C. *Scott v. Gould*, 4 *Taunt.* 156. *Hannam v. Dietrichsen*, 5 *Taunt.* 853.

What the affidavit to obtain *distringas* must contain.

It must set out the *English* notice subscribed to the process in *hæc verba*. *Hannam v. Dietrichsen*, 5 *Taunt.* 853. *Hill v. Wilkinson*, 4 *Id.* 619.

The court granted a *distringas* on affidavits stating, that it was believed that the defendant absconded to avoid process; that repeated applications had been made at his house, and no satisfactory answer had ever been given to the inquiry as to the time of his coming home; and, that on learning that the business of the applicant was to serve the defendant with process, the persons at the house treated him with derision. 8 *Taunt.* 57.

Where sufficient.

But where the affidavit stated that the defendant's wife said that her husband was absent from his house for fear of his creditors, *distringas* was refused, on the ground that the declaration of the wife ought not to prejudice the husband. *France v. Stephens*, 3 *J. B. Moore*, 23.

Where affidavit under the statute insufficient.

After a summons and *distringas* issued against a privileged defendant in the county where the action is brought, but in which he did not reside, and of which process he had no notice, and returns of *non est inventus* and *nulla bona*, a *testatum distringas* may regularly issue into the county in which he resides and has property, without any new summons in such county; but the sheriff ought not to levy more than 40s. under such *testatum distringas* in the first instance, according to the usual course. *Bloxam v. Surtees*, 4 *East*, 162.

Where *testatum* without new summons sufficient, and what may be levied thereon.

Of the terms of
restitution on
appearance.

It is in the discretion of the court of C. P. to put a defendant under terms who moves to have the issues, levied under several writs of *distringas*, restored to him on his appearance according to statute 10, G. III. c. 60. s. 4. *Cazalet v. Dubois*, 1 B. & P. 81.

A plaintiff having arrested two partners on a *quo minus*, and proceeded against an absent third by a *venire facias ad respondendum*, under which issues and increased issues had been levied on the partnership goods; that court refused, on cause shewn against a rule for that purpose, to set aside the proceedings, and order the money levied to be restored, and the effects to be delivered up, although it was sworn on the part of the absent defendant, that he was absent on his business as a mariner, and not for the purpose of avoiding proceedings. *Macmurdo v. Birch*, 5 Price, 522.

When irregularity in issuing *distringas* must be noticed.

An irregularity in the suing a writ of *distringas* (and any process) must be taken notice of the first opportunity, or it will be too late if the plaintiff have taken any other step in the cause. *Downes v. Wetherington*, 2 Taunt. 243.

VI. AS TO PRECEDING SECTION.

PRACTICAL DIRECTIONS.

With reference to *distringas* following writ of *quare clausum fregit*, the statute points out the practice. On such *distringas* it seems only one levy of 40s. can now be made.

The statute indeed gives the plaintiff a better remedy than that consequent of the issuing an alias *distringas*; but it cannot be said that such proceeding is altogether abandoned.

To obtain the *distringas*, therefore, the first step is to issue the original *quare clausum fregit*. Give precept containing county and names of parties to the proper cursitor, who thereupon makes out the writ; pay him 8s. 6d. For expedition, the attorney, as in other cases, prepares, and the cursitor puts upon it the marks or seal of office. The proper sheriff grants the summons; pay 2s. 6d.; this is handed to the officer usually employed, who, under the statute, serves it. The officer receives 5s. for service upon each defendant.

The statute indicates the next step, viz. to procure the sheriff's return. This will be either that he has personally served the summons and notice on the defendant, or that the sheriff not meeting with him, had left the summons at his dwelling-house.

Should not an appearance be entered in due time, that is to say, on the return day of the summons, an affidavit to ground the *distringas* may be made. On points affecting this affidavit, several cases will appear, sect. v.

Application is made to the court in term, or to a judge in vacation for such affidavit, sworn as is usual respecting other affidavits made on motion for a rule or order for the *distringas*. This is issued as in other cases where it is still allowed. See sect. i.

It has already been observed, that only one levy of 40s. can be made. It will also have been gathered, that to proceed by *distringas* is not always advisable; but on the contrary, not so advantageous as the proceeding upon the affidavit of the officer to file a common appearance for the defendant, according to the statute.

It has been determined, that the act of 10 G. III. c. 50. extends to issues levied under every description of distringas. Raban v. Plaistow, 5 Burr. 2728.

If the defendant should appear and claim a return of the levy, he must pay the costs; and, if a distringas have issued, although no levy hath been made thereon, the court, previously to allowing the appearance to have any effect, will probably direct the costs to be paid.

It will be obvious that the act being silent in both these respects, what is proper to be done is left to the summary discretion of the court. The appearance is entered in the usual way to the original, and not to the distringas. See title APPEARANCE.

FORMS.

The statute above set forth has sufficiently, indeed fully, described those requisite to be pursued under the new practice.

VII. AS TO DISTRINGAS JURATORES.

PRACTICAL DIRECTIONS.

This writ forms part of the jury process, but it seems more consonant with the plan of this compilation to insert the title in this place.

The end or object of this writ is to enable the sheriff to compel the attendance of persons to serve on a jury. The FORM, No. 11, subjoined, will amply explain such its purpose. It is to be tested the return-day of the venire; such return being any return-day before the trial; the return-day of the distringas juratores is to be the first return after the trial. If at the assizes, the venire must be tested the first return-day of the term preceeding the assizes, and returnable the last day of that term; the distringas juratores must be tested on that day, and made returnable the first return of the next term after the assizes.

It is kept at the stationer's in blank on parchment; it is only sealed; 7d.

If the cause be to be tried in London, take the writ to the sheriff's office in Giltspur-street; if in a common case pay returning 4s. 4d.; if special 4s. 8d. If to be tried in Middlesex, pay returning 14s. 8d. If the cause be to be tried at the assizes, the distringas is to be returned by the under sheriff in the county, or by the under-sheriff in town. It is amendable after verdict, the venire being right. Bullock v. Parsons, 2 Ld. Raym. 1143.

See title HABEAS CORPORA JURATORUM. This writ is in C. P., what distringas juratores is in K. B. Also title VENIRE,

VIII. FORMS.

APPLICABLE TO THE FOREGOING HEADS.

George, (&c.) To the sheriff of ———, greeting: We command you that you distrain ———, of ———, (describe the peer as in the original writ) by all his lands and chattels in your bailiwick, so that neither he, nor any one for him, do intermeddle therewith, until you shall have other command in that behalf from us; and that you answer us for the issues of the same, so that he be before us ——— (a general return) wheresoever we shall then be in England, to answer in a plea (as in the precipe to the end) to the damage of the said ———, of £——— and to hear his judgment thereof for his former defaults, and have you there this writ. Witness, Sir

No. 1.
Writ of distringas
against a peer.

DISTRINGAS; VIII. FORMS.

Charles Abbott, knight, at Westminster, the ——— day of ——— (being by original, let there be fifteen days between the tasto and the return) in the ——— year of our reign.

No. 2.
The like against
a member of par-
liament.

George, (&c.) To the sheriff of ———, greeting: We command you that you distrain ——— (*describe the member of parliament as in the bill*) having privilege of parliament, by all his lands and chattels in your bailiwick, so that neither he, nor any one for him, do intermeddle therewith until you shall have other command in that behalf from us; and that you answer us for the issues of the same, so that he be before us at Westminster, on ——— next after ———, to answer ——— in a plea of trespass on the case upon promises to the said ——— his damage of £———* and to hear his judgment thereof for his former defaults; and have there then this writ. Witness, (&c.)

No. 3. ——— *distringas* for ——— against ——— having privilege
Præcipe for same. of parliament. Case, returnable on, &c.
(*Date*) ———, attorney.

No. 4.
Testatum distrin-
gas against either
peer or member
of parliament.

(*The writ will be the same as far as the* Nos. 1 and 2. as the case may be*) ——— and for that our sheriff of ———, at a certain day now past returned to us, that the said ——— had not any thing in his bailiwick, whereby he could cause him to be distrained, as by the said writ he was commanded; whereas it is testified in our same court before us, that the said ——— hath sufficient lands and chattels in your bailiwick by which he may be distrained; and have you there then this writ. Witness, (&c.)

No. 5.
Indorsement as
instructions to
move that issues
be sold, &c.

To move for a rule to shew cause why the issues returned upon the several writs of *distringas* should not be sold, and the monies arising from the sale thereof should not be forthwith brought into court, and why it should not be referred to the master to tax the plaintiff his costs, occasioned by his issuing out the said several writs, and why the costs, when taxed, should not be paid out of the monies so brought into court, and why the surplus of the said money, after payment of the said costs, should not be retained in court until the purpose of the said writ is answered.

No. 6.
Distringas against
a peer or mem-
ber, C. P.
Debt.

George, (&c.) To the sheriff of ———, greeting: We command you that you distrain ——— (*describe the peer or member as in the previous proceeding*) having privilege of parliament, by all his lands and chattels in your bailiwick, so that neither he or any one through him, put his hands thereon until you shall have other command from us, and that of the issues thereof you answer to us, so that he be before our justices at Westminster, on ——— next after ———, to answer to ——— in a plea that he render to him £——— which he owes to and unjustly detains from him: For that whereas (*here copy the bill*) to the damage of the said ——— of £——— as it is said, and to hear judgment thereof for his former defaults; and have you there this writ. Witness, Sir William Draper Best, knight, at Westminster, (&c.)

No. 7.
Præcipe for same.

The *præcipe* as No. 3, *mutatis mutandis*,

No. 8.
Writ of *distringas*
on *quare clausum*
fregit.

George, (&c.) To the sheriff of ———, greeting: We command you that you distrain ———, late of (———, as in the *quare clausum fregit*) by all his lands and chattels in your bailiwick, so that

neither he, nor any one for him, do intermeddle therewith, until you shall have another command in that behalf from us; and that you answer us for the issues of the same, that he be before our justices at Westminster (*here insert a general return, between which and the teste there need not be in this writ fifteen days*) to answer _____ in a plea, wherefore with force and arms he broke the close of the said _____, at _____, to the great damage of the said _____, and to hear judgment for his many defaults; and have you there this writ. Witness, _____, at Westminster, the _____ day of _____ (*see observation above as to return and teste*), in the _____ year of our reign.

_____, to wit. *Distringas* for _____ against _____, late of (*as in the quare clausum fregit*) trespass at _____ returnable. _____, attorney. **No. 9.**
Præcipe for same.

George, (&c.) To _____ and _____ (*elisors*) by the court here elected and chosen for that purpose, greeting: We command you that you distrain _____ (*the officer by his title and office*) by all his lands and chattels in the bailiwick of the said _____ (*the officer by the name of his office*) so that neither he, nor any one for him, do lay hands on the same, until you receive another command from us in that behalf, and that you answer to us for the issues thereof, so that the said _____ (*the officer by the name of his office*) have before us at Westminster, on _____ next after _____, the body of _____, by him taken and in our prison under his custody detained, as appears by the return of the said _____ (*the officer by the name of his office*) heretofore by him sent into our court before us at Westminster aforesaid, to answer _____ of a plea of trespass, and also to a bill of the said _____ against the said _____ for £_____, upon promises (*as the plea may be*) according to the custom of our court before us to be exhibited, and for the said _____ (*officer by his name of office*) to hear his judgment thereupon of many defaults; and have then there this writ. Witness, _____.

No. 10.
Distringas against a peer, or against an officer, being of a peculiar jurisdiction, to compel the bringing in the body. Directed to elisors.

George, (&c.) To the sheriff of _____, greeting: We command you that you distrain the bodies of (if the jury be special, or the trial be at bar, leave out the words in italic, and insert the names of the special jury, as in the master's list) *the several persons named in the panel hereunto annexed*, jurors summoned in our court before us, between _____ plaintiff, and _____ defendant, by all their lands and chattels in your bailiwick, so that neither they, nor any one for them, do intermeddle therewith, until you shall have other command in that behalf; and that you answer to us for the issues of the same, so that you have their bodies before us at Westminster, (*here insert the first return-day after the trial*) or before our right, trusty, and well-beloved Sir Charles Abbott, knight, our chief justice assigned to hold the pleas in our court before us, if he shall first come on _____ the _____ day of _____ (*here insert the day of trial*) at Westminster Hall, in the county of Middlesex aforesaid, according to the form of the statute in such case made and provided, to make a certain jury between the said parties of a plea of trespass on the case, and to hear their judgment of many defaults; (if trial be by proviso, after "defaults," add in this place "provided always that if two writs shall come to you thereupon, then you execute and return one of them only") and have you there the names of the jurors and this writ. Witness, Sir Charles Abbott, knight; at

No. 11.
Form of distringas juratores.

DISTRINGAS; VIII. FORMS. DOGGETING, &c.

Westminster, the _____ day of _____ (*the teste must be the return day of the venire*) in the _____ year of our reign.

If cause be tried in London, say, "at the Guildhall of the city of London"—If at the assizes say, "before our justices assigned to take the assizes in your county, if they shall first come on _____ (the commission-day) at _____ (the place) in your said county."

No. 12.
Distringas in case of view by a common jury.

George, (&c.) To the sheriff of _____, greeting: We command you _____ (*copy the common distringas to the words "many defaults," and then proceed*) and in the mean time, according to the form of the statute in such case made and provided, we command you that you have six, or (if the jury be special, after the word "or" leave out the words in italic, and insert "more of the first twelve of the said jurors," instead of the words in italic), *some greater number of the said jurors, who shall be mutually consented to by the said* _____ (plaintiff) and _____ (defendant) or their agents to take a view of the place in question on _____, the _____ day of _____, and that the same jurors meet on the same day, at the house of _____ in your county, and proceed from thence to view the said place in the presence of _____, on the part of the plaintiff, and _____ on the part of the defendant, appointed by our court before us, to shew the said place to such of the said jurors as shall come to view the same, and in what manner you shall have executed this our command, make appear to us at Westminster on the said day (*if by original add "wheresoever, &c."*) and have there then this writ. Witness, _____.

No. 13.
Distringas against late sheriff to expose to sale goods taken on ft. fa. in assumpsit, C. P.

George, (&c.) To the sheriff of _____, greeting: We command you, that you distrain _____, esq. late sheriff of your county (or "your predecessor") by all his lands and chattels in your bailiwick, so that neither he, nor any one by him, do lay hands on the same, until you therein have another command from us, and that you answer to us for the issues of those lands, so that he expose to sale those goods and chattels which were of _____, in your bailiwick, to the value of £_____, which lately in our court before _____ and his companions, our justices of the Bench at Westminster, were adjudged to _____, for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said _____ to the said _____, as for his costs and charges by him about his suit in that behalf expended, whereof the said _____ was convicted, and which goods and chattels he lately took by virtue of our writ, and which remain in his hands unsold, for defect of buyers; as the said late sheriff returned to our said justices at Westminster, at a certain day now past; and have that money before our justices of the Bench at Westminster, to be rendered to the said _____ for his damages aforesaid; and have there this writ. Witness, _____, at Westminster, the _____ day of _____, in the _____ year of our reign.

DOCKETING. See next title.

DOGGETING, *Doggeting Issue. Doggeting Judgment. Doggeting Roll.*

What.
Its importance
to whom.

The formal registering of certain judicial proceedings.
The carrying in the roll and doggeting the judgment is of the greatest importance to the chief clerk, to the attorney, and to any

purchaser who may be injured by reason of the omission ; the courts, as well as statutes, have pointed out the importance ; and in the case of *Douglas, widow v. Yallop*, 2 *Burr.* 722, Lord Mansfield, C. J. intimated, that it very much concerned the chief clerk to take care that judgments be actually entered up upon the roll in due time and doggeted, for that after he had received his fees for making such entry, he would be liable to an action upon the case, to be brought by a purchaser, who should have become liable to it, and had searched the roll, without finding it entered up ; and he said, that the attorney who had undertaken to do this, and neglected it, would be liable indeed to the chief clerk ; but still the chief clerk would be liable to the purchaser, who had suffered by this neglect.

By *R. G. K. B. E. 17 Jac. I.* all judgments for sums amounting to 20*l.* are to be regularly doggeted by the attorney making a note on parchment or paper, containing the names of the parties, the debt and damages recovered, and the term and roll, and where such judgment shall be entered, and delivering it to the proper officer, who is to register the same in a book kept for the purpose. And by rule, *E. 1757*, the defendants names in all judgments to be entered, shall be entered in a remembrance or docket alphabetically, for the better finding out such judgments.

*R. G. K. B.
E. 17 Jac. I.*

And by stat. 29 *C. II. c. 3. s. 14*, officer of the courts at Westminster signing judgments shall set down the day of the month and year of so doing upon the paper book, docket, or record, which he shall sign, and day of the month and year of signing the same, to be entered upon the margin of the roll.

*Stat. 29 C. II.
c. 3.*

By *s. 15*, such judgments, as against purchasers, *bonâ fide*, for valuable consideration of lands, &c. to be charged thereby, shall be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original, or filing the bail.

And by *s. 16*, no writ of *fi. fa.*, or other execution, shall bind the property of the goods [of him?] against whom such writ is sued, but from the time that such writ shall be delivered to the sheriff, &c. to be executed. And such sheriff, &c. is to indorse upon the back thereof the day of the month or [and ?] year when he shall receive the same.

Stat. 4 & 5 W. & M. c. 20, provides, first, in what manner and at what time judgments shall be doggeted by the respective officers in books for that purpose, that the same may be searched for by any one paying ; and upon neglect of the officers in such case, gives the penalty of 100*l.*, half to the party grieved, and the other half to any one who shall sue for the same.

*Stat. 4 & 5 W.
& M. c. 20.*

And by *s. 3*, no judgment not doggeted and entered in the book as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, and administrators, in their administration of their ancestors, testators, or intestate estates.

And *s. 4* gives the clerks of the judgments four-pence over and above their usual fees for their trouble.

All interlocutory judgments are entered on the roll, if by bill, the term they are signed.

Of term when interlocutory judgments to be entered.

And issues by bill.

Of issues by original.

As to entry on warrant of attorney. In what case to obtain an original writ.

Where defendant makes the entry of what term entitled.

All issues are to be entered on the roll, if by bill, the term they are joined.

Issues, although by original, are entered of the term the same are joined; the want of an original cannot, after verdict, be assigned as error. In special cases, the clerk of the papers makes up the paper-book or issue, and enters the requisite continuances.

It will be obvious that the entry, if on a warrant of attorney, will be of the term the judgment is signed, or entered up.

But if the original writ be of the term the judgment is signed, it will not warrant that judgment if it appear upon the same record that there have been proceedings of a preceding term; therefore an original, returnable the term the declaration is of, must be obtained. See *Dykes v. Sweeting*, 1 *Wils.* 181.

Where the defendant makes the entry of a judgment in his favour, as on *non pros*, the entry is entitled of the term the *non pros* is signed; proper continuances being of course also entered; and he may, in case the plaintiff be *non procees*, also enter both warrants of attorney.

PRACTICAL DIRECTIONS, K. B.

In order to make the dogget or docket, properly, it will be necessary to obtain a roll of Mr. ———, stationer, ———, who now issues them, on the appointment of the lord chief justice.

In T. 12 G. II., upon complaint to the Ld. Ch. Just. K. B., notice was given that no other rolls than those marked by Mr. Billingsley should be received and allowed by the clerk of the treasury. Rules and Orders, K. B. 259.

On this roll the entry is to be made. R. G. H. 1657, directs that all the rolls be entered in a full fair hand, with a large margin of an inch at the least, and a convenient distance at the top, for the binding up of the same, and at the bottom, that the writing be not rubbed out.

The usual mode is to allow as much for convenient binding up, as the roll is wide, and to leave at the bottom about an inch. If necessary to be written on the other side, make a similar margin, and begin at the same distance from the top of the roll, as at first commencing the roll.

The roll begins with the term (large round hand). "Also of the term of Saint Hilary, in the ——— year of the reign of king ——— the ———. Witness, Sir Charles Abbott, Knight."

Then enter the plaintiff's warrant of attorney, with the venue in the margin prefixed; and on a new line, separately, the defendant's warrant in like manner. See No. 1, FORMS subjoined.

After these, on a new line, repeat the venue in the margin, and commence with the memorandum. See No. 2, FORMS subjoined, and where there is an issue, proceed to its end.

The entry being thus complete, in case there be issue, the docket may be prepared.

The number or numbers, if there be more rolls than one, to be carried in and docketed by the attorney applying the same term issue is joined, or judgment signed, is or are obtained from the clerk of the docket, K. B. office. The attorney signs his name to the parchment roll, and puts a number at the foot of that on which the entry is made thus: Roll, 650; then, on a plain piece of paper, write the docket according to some or one of those as the case may be, No. 3, FORMS subjoined.

This paper, and the draughts of the different proceedings, such as those of the issues, judgments, and paper-books, are then taken to the judgment office, K. B. The clerk stamps or marks the roll or rolls; pay,

if no other entries previously made the same term, 3s.; but if any have been made, 1s. only. If payment for the entries hath not already been made, as on signing interlocutory judgment, or entering issue, such payment will have been made, it must now be made.

If the entry shall not have been carried in as of the term the issue is joined, additional fees are due, viz. 4s. 8d. for the number of the roll in this case, to be had of the clerk of the nisi prius, at the Treasury, K. B. Westminster, in term time, or at his house in vacation; having docketed the same with the clerk of the judgments as before, take the roll to the clerk of the nisi prius office, either at the Treasury, or at his house; that officer returns 4d. on the receipt of each roll.

Where the entry of the issue shall already have been made and carried in before trial, as is the case where the plaintiff has been ruled to enter the issue; the postea, in case of trial, and the inquisition, in case of inquiry, being marked with the costs and taxes thereon, are to be taken to the Treasury; the officer enters the judgment on the roll; for that on a postea pay 2s.; that on an inquiry, 1s. 6d.

FORMS.

(Venue). ——— (plaintiff), puts in his place ———, his attorney, against ——— (defendant), in a plea of ———, (as the case is).

No. 1.
The plaintiff's and defendant's warrants of attorney.

(Venue). The said ——— (defendant), puts in his place ———, his attorney, at the suit of the said ——— (plaintiff).

(Venue). BE IT REMEMBERED, that (go on with the issue to the end).

No. 2.
The memorandum, as in the issue.

The entry of ——— (attorney's name), gentleman, one, &c. of the term of ———, — Geo. ———, 18—.

No. 3.
Forms of the dockets.

ROLL.

(Venue). Issue joined in assault, between ———, plaintiff, and ———, defendant, on a plea of ——— (as the plea is.) } 250

(Venue). Judgment by default in case between ———, plaintiff, and ——— defendant. } 251

(Venue). Judgment by confession, between ———, plaintiff, and ———, defendant, for £—— debt, and ——— costs. } 252

(Venue). Entry of one scire facias, between ———, plaintiff, and ———, defendant, with an award of the second for £500 debt, and ——— damages. } 253

(Venue). Entry of two scire faciases, between ———, plaintiff, and ———, defendant, for £500 debt, and ——— damages. } 254

(Venue). Entry of judgments of assets in futuro, between ———, plaintiff, and ———, executor (or administrator) of ———, deceased, defendant, for £500 debt. } 255

(Venue). Entry of judgment by nil dicit, between ———, plaintiff, and ———, defendant, for £—— debt, and ——— damages. } 256

These forms of dockets will of course be varied according to the nature of the pleadings.

PRACTICAL DIRECTIONS, C. P.

The rolls of Michaelmas are allowed to be taken in, and docketed in Hilary term, those of Hilary in Easter, those of Easter in Trinity, and those of Trinity in Michaelmas. This is said to be by indulgence. For R. E. 5 W. & M. cited 1 Sell. 508, orders the rolls to be brought in before the essoign days of the respective following terms, and that 12d. is to be paid to the clerk of the essoign for every roll brought in after that time. And, by the same rule, plea rolls are to be brought in, in three weeks after the end of the term following; and, if after that time, 12d. to be paid for each roll.

The warrants of attorney are first entered on a separate piece of parchment, agreeably to FORMS No. 1, C. P. subjoined. This is to be taken to the warrant of attorney office, and filed; if the action be in debt, pay 4d.; if in case, pay 1s. 4d. The roll having been obtained from the prothonotaries, must then be returned to their office, with the entries thereon, beginning with the declaration, or issue at once; the warrants of attorney being on separate parchment, and no memorandum, as in K. B. by bill being necessary, except in cases of privilege, and then a memorandum forms a part of the entry, as in K. B. by bill. See 1 Cramp. 203. If the entries have been paid for before, nothing more is demanded; if not, the charge is 8d. per sheet, except in debt, trespass, and detinue, in which only 4d. per sheet is charged. The clerk, on request, hands the docket roll, on which the attorney himself, or his clerk, enters the docket. No difficulty can occur as to a form, as the roll contains the previous dockets of the term. Recollect, however, that as in K. B. the nature of the action must be expressed in the docket.

FORMS, C. P.

No. 1.
Warrants of
attorney.

(Venue), to wit, _____ puts in his place _____, his attorney,
against _____, late of _____ (as in the proceeding), in a plea
of _____.

(Venue), to wit. The said _____ puts in his place _____,
his attorney, at the suit of the said _____, in the plea aforesaid,

No. 2.
Form of dockets,
C. P.

Not informed, in Debt,

ROLL,

(Venue),

Grey for Wright.

Says nothing in case,

(Venue).

Wilson for Roberts.

Nul tiel record in case,

(Venue).

Johnson for Adams.

Forejudger.

(Venue).

Smith for Thompson,
against
Cramer, an attorney.

DOUBLE PLEA. See title PLEA, PLEADING.

DOWER: The law proceedings in dower are very analogous with those to be found under title RIGHT, WRIT of RIGHT, which see.

I have inserted it with some slight alterations here, in order that in respect of dower the consecutive steps, as they present themselves on record, may at once be seen—a precedent actually used in practice. The instructions upon which the draught was settled were as follow:—

J. W., as widow of T. W., who died the _____ day of _____, claims dower against T. W., as heir of his father, of 100 acres of land, in the parish of _____, in the county of _____; also of 100 acres in the parish of _____, in _____.

The heir says his mother was never married to his father; that his father was not seised of the lands; that the lands in _____ are gavel-kind; that he is not tenant of any part, or, at least, of only a small part of each, about 10 acres in _____; 15 in _____. The heir also says he has been always ready to assign dower. He further says the demandant abated, and was in by abatement till _____.

The demandant denies the truth of every one of the pleas.

All the pleas to be found against the heir.

To draw proper entries, &c. &c.

See *Booth*, 166—171, and *Com. Dig.* titles *Dower*, *Pleader*, 2 Y. 1, &c.

To attend particularly to the several pleas in dower; observe the nature and consequence of each.

FORMS.

Term, 18 G. III.

* Middlesex. J. W., widow, who was the wife of T. W. the eldest, by A. B., her attorney, demands against T. W. the younger, son and heir of the said T. W. the elder, deceased, the third part of 100 acres of meadow land, with the appurtenances, in the parish of _____, in the said county of _____, as her dower, on the endowment of the aforesaid T. W., formerly her husband, and whereof she hath nothing, &c. Count.

Term, 18 G. III.

Wallace, the younger, } And the said T. W. the younger, by O. D., Pleas in bar.
 } his attorney, comes and says †, that the said
 } J. W. ought not to have dower of the said
 Wallace, widow. } 100 acres of meadow land, with the appurtenances, whereof, &c. on
 } the endowment of the said T. W. the elder, because the said T. W.
 } the younger says, that the said J. was never joined in lawful matri-
 } mony to the said T. W. the elder, deceased, and this the said
 } T. W. the younger is ready to verify; wherefore he prays judgment
 } if the said J. ought to have her dower of the said 100 acres of
 } meadow land, with the appurtenances, whereof, &c. against him, &c.
 } And for further plea in this behalf, the said T. W. the younger,
 } by leave of, &c. according, &c. says, that the said J. ought not to
 } have her dower of the said 100 acres of meadow land, with the ap-
 } purtenances, whereof, &c. against him, because he says, that the
 } said T. W., deceased, neither on the day in which he is supposed to

* The action of dower being a real one, is of course local; therefore, on the instructions given in this case, there must be two actions; one for the lands in Middlesex, and another for those in Kent. The dower for the lands in

Kent will in substance be the same as the above.

† The land should be described so certainly that the sheriff may be able to give seisin of the third part. 5 *Com. Dig.* 240.

‡ See 3 *Com.* 297, &c.

have espoused the said J., or at any time afterwards, was seised of the said 100 acres of meadow land, with the appurtenances, whereof, &c. of such estate therein as the said J. could be endowable thereof, and of this the said T. W. the younger puts himself upon the country, &c. And for further plea, as to 90 acres, parcel of the said 100 acres of meadow land, with the appurtenances, whereof, &c. he the said T. the younger, by like leave of, &c. according, &c. says, that the said T. the younger cannot render to the said J. her dower thereof, because he saith that the said T. the younger is not, nor on the day of suing forth the original writ of the said J., was not, nor at any time since hath been, tenant of the said 90 acres, parcel, &c. with the appurtenances, whereof, &c. as of freehold; and this, &c.; wherefore he prays judgment of the said writ as to the said 90 acres, parcel, &c. with the appurtenances, whereof, &c.; and that the same, as to the said 90 acres, may be quashed. And for further plea, as to 10 acres, residue of the said 100 acres of meadow land, with the appurtenances, whereof, &c. the said T. the younger, by like leave of, &c. according, &c. saith, that the said T. the elder, deceased, heretofore in his life-time, was seised in his demesne as of fee, of and in the said 10 acres, residue, &c. with the appurtenances, whereof, &c.; and being so seised thereof, the said T. the elder, afterwards, to wit, on the _____ day of _____ aforesaid, at the parish of _____ aforesaid, died so seised thereof, after whose death, to wit, on the day and year aforesaid, the said J. abated and intruded into the said 10 acres, residue, &c. with the appurtenances, whereof, &c. and became possessed thereof, and remained and continued in the possession and seisin thereof by abatement and intrusion, from the time of the death of the said T. the elder, until the _____ day of _____, in the year of our Lord _____. And the said T. the younger further saith, that after the death of the said T. the elder, deceased, to wit, on the same day and year last aforesaid, the said T. the younger entered into the said 10 acres, residue, &c. with the appurtenances, whereof, &c. and was and from thence hitherto hath been and still is seised thereof in his demesne as of freehold; and the said T. the younger further saith, that the said T. the younger, on the said _____ day of _____, in the year last aforesaid, was and from thence always hitherto hath been and still is ready to render to the said J. her dower of the said 10 acres of land, residue, &c. with the appurtenances, whereof, &c.; and this the said T. the younger renders to her here in court, &c.*

_____ Term, 18 G. III.

Replications and
rejoinders, or
similiters to each
plea.

Wallace, widow,	}	And the said J., as to the said plea of the said T. W. the younger, by him first above pleaded in bar, says, that she, by reason of any thing by him above in that plea alleged, ought not to be barred from having dower of the said 100 acres of meadow land, with the appurtenances, whereof, &c. on the endowment of the said T. W. the elder, because she says, that the said J., on the _____ day of _____, at _____, in the county of _____, at and
v. Wallace, the younger.		

* This plea is a translation from one in *Laws*. 715; and, as laid down in the books is a plea in bar, yet I conceive it is a bar only in respect to a defeat of plaintiff in the recovery of damage for

the detention of her dower from death of the baron; and yet it wants all the form of such plea. The replication to it however answers it as a plea in bar in that particular. Vide 1 *Laws*. 716.

In the parish church of ——— aforesaid, was joined in lawful matrimony to the said T. the elder, and this she is ready to verify, when, where, and in what manner this court here shall order, &c.; and because the cognizance of pleas of this kind wholly belongs to the Spiritual Court, therefore the bishop of ———, the diocesan of that place, is commanded that he, calling together all such persons as in this behalf ought to be called together before him, diligently inquire into the truth of the premises, and that he certify what on such inquiry he shall find therein to his majesty's justices here [*the return day*], by his letters patent, and closed, &c.* And the said J., as to the said plea of the said T. W. the younger, by him secondly above pleaded in bar, and whereof he hath put himself upon the country, doth the like, &c.; and the said J., as to the said plea of the said T. W. the younger, by him above pleaded as to 90 acres, parcel of the said 100 acres of meadow land, with the appurtenances, whereof, &c. says, that by reason of any thing by him above in that plea alleged, the said original writ of the said J., as to the said 90 acres, parcel, &c. with the appurtenances, whereof, &c. ought not to be quashed, because she says, that the said T. the younger is, and on the day of suing forth the original writ of the said J. was, and ever since hath been, tenant of the said 90 acres, parcel, &c. with the appurtenances, whereof, &c. as of freehold; and this the said J. prays may be inquired of by the country; and the said T. the younger doth the like, &c. And the said J., as to the said plea of the said T. W. the younger, by him above pleaded in bar, as to 10 acres, residue of the said 100 acres of meadow land, with the appurtenances, whereof, &c. says, that she by reason of any thing by him above in that plea alleged, ought not to be barred from having her dower of the said 10 acres, residue, &c. with the appurtenances, whereof, &c. on the endowment of the said T. W. the elder, because she says, that the said J., after the death of the said T. W. the elder, did not abate nor intrude into the said 10 acres, residue, &c. with the appurtenances; whereof, &c. nor did remain or continue in the possession and seisin thereof by abatement or intrusion from the time of the death of the said T. the elder, until the ——— day of ———, in manner and form as the said T. the younger hath above in his said plea in that behalf alleged; and this the said J. prays may be inquired of by the country; and the said T. W. the younger doth the like, &c. And the said J. for the value † of her dower of the said 100 acres of meadow land, with the appurtenances, whereof, &c. on the endowment of the said T. W. the elder, from the time of the death of the said T. the elder, and for her damages by her sustained on occasion of the detention thereof, says, that the said T. the elder died seised of the said 100 acres of meadow land, with the appurtenances, whereof, &c. to wit, in his demesne as of fee, and that the said J., after the death of the said T. the elder, and before the suing forth the original writ of the said J., to wit, on the said ——— day of ——— aforesaid, at the parish aforesaid, requested the said T. W. the younger to render to the said J. her dower of the said 100 acres of meadow land, with the appurtenances, whereof, &c.; and that the said T. the younger, to render to the said

* Where issue is joined immediately on this plea, say "the same day is given to the said parties here," &c.

† The statute of Merton, 20 H. III. c. 1. gives damages and costs in dower

unde nihil habet, where the husband dies seised, which must be found by the jury; but in no other case, and no other sorts of dower, are entitled to costs.

J. her dower of the said 100 acres of meadow land, with the appurtenances, whereof, &c. then and there wholly refused and still refuses, and this she is ready to verify; wherefore she prays judgment, and the value of her dower aforesaid, from the time of the death of the said T. W. the elder, together with her damages by her sustained on occasion of the detention thereof, to be adjudged to her, &c.

Term, 18 G. III.

Special rejoinder
as to other plea.

Wallace, the younger, }
 ats.

Wallace, widow. } J. by her above pleaded for the value of her dower of the said 100 acres of meadow land, with the appurtenances, whereof, &c. on the endowment of the said T. W. the elder, from the time of the death of the said T. W. the elder, and for her damages by her sustained on occasion of the detention thereof, says, that the said J. *ought not to recover* the value of her dower aforesaid, nor damages on occasion of the detention thereof against him, because protesting that the said J. did not request the said T. W. the younger to render to her the said J. her dower of the said 100 acres of, &c. with the appurtenances thereof, &c. in manner and form as the said J. hath above in her said plea in that behalf alleged; for plea in this behalf, by the said T. W. the younger, the said T. the younger says, that the said T. the younger, to render to the said J. her dower of the said 100 acres of, &c. with the appurtenances whereof, did not refuse in manner and form as the said J. hath above in her said plea in that behalf alleged. And of this he puts himself upon the country, and the said J. doth the like, &c.

Term, 18 G. III.

Issue.

Middlesex. J. W. widow, who was, &c. [*set forth the declaration verbatim.*]

And the said T. W. the younger, by C. D. his attorney, comes and says, that [*&c. set forth the plea verbatim.*]

And the said J. as to the said plea of the said T. W. the younger, by him first above pleaded in bar says, that [*&c. set forth replication verbatim.*]

And the said T. the younger, as to the said plea of the said J. by her above pleaded for her value of her dower of, &c. on the endowment of, &c. and for her damages by her sustained on occasion of the detention thereof, [*&c. set forth rejoinder verbatim, then award the venire as follows:*] Therefore as well to try this issue as the several other issues above joined between the parties aforesaid to be tried by the country, the sheriff is commanded that he cause to come here ——— aforesaid, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the said parties here, &c.

COOKE.

Record of nisi
prius.

Pleas at Westminster before Sir ———, knight, and his companions, justices of our lord the king, of the Bench, of ——— term, in the ——— year of the reign of our sovereign lord George the ———, by the grace of God of Great Britain and Ireland king, defender of the Faith; &c.

Roll.

Middlesex (to wit). J. W. widow, who was the wife of T. W. the elder, by A. B. her attorney, demands against T. W. the younger, the third part of [*&c. to the end of the issue, award of venire, and on a new line add the jurat as follows:*].

Middlesex (to wit). The jury between J. W. plaintiff, and T. W. the younger, defendant, in a plea of dower *unde nihil habet*, whereof she hath nothing, are respited until on * — unless Sir —, knight, the king's chief justice of the Bench, here assessed by virtue of the statute in that case made and provided, shall first come on † — the — day of —, at Westminster, in the great hall of pleas there, commonly called Westminster Hall, in the county of Middlesex, for default of jurors, because none of them did appear: Therefore let the sheriff have the bodies of the several persons mentioned in the pannel annexed to the writ of *hab. corp. jurata*, and be it known that the justices here in court in this same term, delivered a writ thereupon to the deputy of the sheriff of the county aforesaid, to be executed in due form of law, &c.

Afterwards, on the day, and at the place within contained, before Sir —, knight, chief justice, within written; A. B. gent. being associated to him, according to the form of the statute in such case made and provided, cometh the within-named J. W. by her attorney within contained, and the within-written T. W. the younger, by his attorney within-named; and the right reverend —, bishop of London, returns on the said writ of *certiorari* to him directed as aforesaid, that he, having called together before him all such persons as in this behalf ought to be called together, evidently did find, and did certify that the said J. W. on the said — day of —, A. D. 18—, at —, in the county of —, at and in the parish church of — aforesaid, was joined in lawful matrimony to the said T. W. the elder, and that they the said T. W. the elder, and J. at the time and place aforesaid were lawfully married together, and were publickly reputed and taken to be lawful man and wife till the day of the death of the said T. W. the elder, and whereupon the jurors of the jury, whereof mention is within made, being drawn by ballot according to the form of the statute in such case made and provided, and called, also come, who, being elected, tried, and sworn to speak the truth concerning the matters herein contained, as to the first issue between the parties aforesaid within-joined, to be tried by the country, do say upon their oath, that the said T. W. the former husband of the said J. on the day on which he espoused the said J. and afterwards was seised of the said 100 acres of meadow land, with the appurtenances whereof, &c. of such estate therein as the said J. could be endowable thereof. And as to the second issue between the parties aforesaid within-joined to be tried by the country, do say, upon their oath aforesaid, that the said T. the younger, is, and on the day of suing forth the original writ of the said J. was, and ever since hath been tenant of the said 90 acres, parcel, &c. with the appurtenances whereof, &c. as of freehold in manner and form as the said J. hath in replying within alleged. And as to the third issue between the parties aforesaid within-joined, to be tried by the country, do say upon their oath aforesaid, that the said J. after the death of the said T. W. the elder, did not abate and enter into the said 10 acres, residue, &c. with the appurtenances whereof, &c. and remain and continue in the possession and seisin thereof by abatement and intrusion from the time of the death of the said T. the elder, until the — day of —, A. D. 18—, in manner and form as the

* The return of the *hab. corp. jur.*, and which should be the next return day after the trial.

† The day of the sittings.

said J. hath in replying within alleged. And as to the fourth issue between the parties aforesaid within joined to be tried by the country, do say upon their oath aforesaid, that the said T. the younger to render to the said J. her dower of the said 100 acres of meadow land, with the appurtenances whereof, &c. did refuse in manner and form as the said J. hath by her said plea by her within pleaded in this behalf alleged. And the said jurors of the said jury within mentioned, upon their oath aforesaid, do further say, that the within-named T. W. the elder, on the ——— day of ———, A. D. 18—, died seised of the said 100 acres of meadow land, with the appurtenances whereof, &c. in his demesne as of fee, and that the said 100 acres of meadow land, with the appurtenances whereof, &c. at the time of the death of the said T. W. the elder, were, and ever since have been, and still are, worth by the year in all issues beyond reprisals according to the true value of the same, a larger sum of money, to wit, the sum of £—— of lawful money of Great Britain, and that ——— year ——— months and ——— days have elapsed from the time of the death of the said T. W. the elder, and they assess the damages of the said J. by her sustained on occasion of the detaining her dower aforesaid for and during all that time beyond the value aforesaid, and over and above her costs and charges by her laid out about her suit in this behalf to a large value, to wit, to the value of £——, and for the said costs and charges to 40s. &c.

Entry of proceedings on, and forming the judgment roll.

Middlesex. J. W. widow, who was [*&c. to the end of the issue, and then proceed as follows:*] At which day the proceedings aforesaid are continued between the said parties of the plea aforesaid by the jury thereof being respited until on ———, unless Sir ———, knight, the king's chief justice of the Bench here assessed, by virtue of the statute in that case made and provided, shall first come on ——— the ——— day of ———, at Westminster, in the great hall of pleas there, commonly called Westminster Hall, in the county of Middlesex, for default of jurors, because none of them did appear, &c. At which day before our lord the king at Westminster, came the parties aforesaid, by their attornies aforesaid, and the chief justice before whom, &c. hath sent here the record had before him, in those words, to wit, Afterwards [*&c. here set out the postea verbatim*] (then go on thus :) Therefore it is considered by the court here, that the said J. W. do recover her seisin against the said T. W. the younger, of the aforesaid third part of the said 100 acres of meadow land, with the appurtenances, to hold the same to her in severalty by metes and bounds, &c. It is also considered by the said court of our lord the king of the Bench here, that the said J. do recover against the said T. W. the younger, as well the value of the said third part during all the time aforesaid, which amounts to £——, as also her damages by her sustained, as well on occasion of the detaining her dower aforesaid from the death of the said T. W. the elder, as for her costs and charges by her laid out about her suit in this behalf by the jury aforesaid in form aforesaid assessed, to £——, and also ———, awarded to her at her request by the justices here by way of increase for his costs and charges by her laid out about her suit in this behalf, which said damages in the whole amount to £——, and the said T. W. the younger, is in mercy, &c.

Writ of certiorari to the bishop, to certify marriage.

George, &c. by the grace of God, of Great Britain and Ireland king, defender of the Faith, &c. To ———, by Divine Permission, bishop of London, greeting: Whereas J., who was the wife of T. W. the elder, deceased, in our court before our justices

at Westminster, hath demanded against T. W. the younger, the third part of * 100 acres of meadow land, with the appurtenances, in the parish of _____, in the county of _____, as her dower on the endowment of the said T. W. her late husband, by our writ of dower, whereof she hath nothing, &c.; and the said T. W. the younger hath come into our said court, and said that the said J. ought not to have dower of the said † 100 acres of meadow land, with the appurtenances, whereof, &c. on the endowment of the said T. W. the elder, because he says, that the said J. was never joined in lawful matrimony to the said T. W. the elder; to which the said J. in our said court, hath replied and said, that she ought not to be barred from having dower of the said ‡ 100 acres of meadow land, with the appurtenances, whereof, &c. on the endowment of the said T. W. the elder, because she said that the said J. on the _____ day of _____, A. D. 18—, at _____, in the county of _____, at and in the parish church of _____ aforesaid, was joined in lawful matrimony to the said T. W. the elder, and because the cognizance of pleas of this kind belongs to the Spiritual Court, we command you, therefore, that § calling together all such persons as in this behalf ought to be called together before you, you diligently inquire into the truth of the premises, and that you certify what on such inquiry you shall find therein to our justices at Westminster, on _____ the _____ day of _____, by your letters patent, and closed, &c. together with this writ, that we may further cause to be done therein as of right and according to the law and custom of our kingdom of England, we shall see fit to be done. Witness, Sir _____, knight, at Westminster, the _____ day of _____, in the _____ year of our reign||.

To the right honourable Sir _____, knight, lord chief justice of his majesty's court of Common Pleas, at Westminster, and the other justices of the same court, _____, by Divine Permission, bishop of London, sendeth greeting: Whereas we have received his majesty's writ hereunto annexed, we do hereby make known and certify, that in obedience to his majesty's said writ, we have in due form of law diligently inquired into the truth of the marriage and coupling of J. W. widow to T. W. the elder, deceased, mentioned in the said writ, in lawful matrimony, and having called together before us all such persons as in this behalf ought to be called together, we evidently find and certify, that the said J. W. on the _____ day of _____, A. D. 18—, at _____, in the county of _____, at and in the parish church of _____ aforesaid, was rightly and duly joined in lawful matrimony to the said T. W. the elder, deceased; and that the said J. and T. W. the elder, deceased, at the time and place aforesaid, were lawfully married together, and from and after the said marriage lived and cohabited together, and were publicly reputed and taken to be lawful man and wife, till the death of the said T. W. the elder. In witness whereof, we have caused our episcopal seal to be affixed to, and have subscribed to these presents. Dated the _____ day of _____, A. D. 18—, and in the _____ year of our translation.

Bishop's certificate.

_____ : LONDON.

* According to declaration.

† According to plea.

‡ According to replication.

§ According to the award of the certiorari.

|| See, for a like writ, *Thesaurus Brevium*, fo. 76, tit. *Eglise*, C. also *Certiorari*.

Writ of seisin or
of possession, &c.

George, (&c.) To the sheriff of Middlesex, greeting: Know ye, that J. W. widow, who was the wife of T. W. the elder, deceased, in our court before our justices at Westminster, by the consideration of our said court, hath recovered her seisin against T. W. the younger, of a third part of 100 acres of meadow land, with the appurtenances, in the parish of ———, in your county, as her dower on the endowment of the aforesaid T. W. the elder, formerly her husband, by our writ of dower, whereof she hath nothing, &c. and therefore we command you that you cause the said J. W. to have her full seisin of the aforesaid third part, with the appurtenances, without delay, to hold to her in severalty, by metes and bounds, and in what manner you shall have executed this our writ, do you make known to our justices at Westminster on ———. We also command you, that of the lands and chattels of the said T. W. the younger in your bailiwick, you cause to be made £—, for the value of the said third part, from the death of the said T. W. deceased, and also £—, which in our said court were adjudged to the said J. W. for her damages which she had sustained, as well on occasion of the detention of her dower of the said third part, from the death of the said T. W. the elder, as for her costs and charges by her laid out about her suit in this behalf, whereof the said T. W. the younger is convicted, as appears to us of record, and that you have that money before our justices at the term aforesaid, to render to the said J. W. for the value and damages aforesaid, and have you there this writ. Witness, Sir ———, knight, at Westminster, the — day of ———, in the — year of our reign.

Sheriff's return
to same.

I do hereby certify to the justices in the within writ mentioned, that by virtue of the said writ to me directed, I did, on the — day of ———, in the — year of the reign of our said lord the now king, cause the said J. W. to have her full seisin of the aforesaid third part in the said writ mentioned, to wit, of the said 100 acres of meadow land in the said writ mentioned, with the appurtenances, in the parish of ———, in my county, to hold to her in severalty, by metes and bounds, as her dower on the endowment of the said T. W. the elder, formerly her husband, in the said writ mentioned, as by the writ aforesaid I am commanded, and of the lands and chattels of the said T. W. the younger, in the said writ mentioned, in my bailiwick, I have caused to be made the sum of £—, in the said writ mentioned, and have that money before the said justices in the said writ mentioned, to render to the said J. W. for the value and damages in such writ mentioned, and this writ, as by the said writ I am also commanded.

———, sheriff.

Entry of bishop's
certificate on
roll.

At which day come here the said parties, by their aforesaid attorneys, and the right reverend ——— returns on the said writ of *certiorari* to him directed as aforesaid, that he having called together before him all such persons as in this behalf ought to be called together, evidently did find and did certify that the said ———, on the said — day of ———, A. D. —, at ———, in the county of ———, in the parish church of ——— aforesaid, was rightly and duly joined in lawful matrimony to the said ———, and that they the said ——— and ———, at the time and place aforesaid, were lawfully married together, and were publicly reputed and taken to be lawful man and wife, till the day of the death of the

said ———, and thereupon the said ——— prays judgment of and upon the premises, but because the justices here will advise amongst themselves what judgment to give in the premises, before they give judgment therein, day is therefore given to the said parties here until ———, to hear their judgment thereupon, because that the said justices here are not yet advised therein, &c.

At which day come here as well the said ——— as the said ———, by their aforesaid attornies, and because the said justices here have not yet advised among themselves what judgment to give in the premises, day is therefore given to the parties aforesaid here, until ———, to hear their judgment thereupon, because that the said justices here are not yet thereon advised, &c. At which day come here the parties aforesaid, by their attornies aforesaid, and thereupon the premises aforesaid being seen and inspected by the said justices here, and by them fully understood, and mature deliberation being thereupon had, It is considered by the court here that the said ——— do recover her seisin against the said ———, of of the aforesaid third part of the ——— aforesaid, with the appurtenances, to hold the same to her in severalty, by metes and bounds, &c. and the said ——— is in mercy, &c.; and thereupon the said ——— says, that the said ———, her said late husband, died seised of the aforesaid tenements, with the appurtenances, and prays the writ of our lord the now king to be directed to the sheriff of the said county of ———, as well to cause her to have full seisin of the aforesaid third part, with the appurtenances, as to inquire of damages, &c. and it is granted unto her, &c. whereupon the sheriff of ——— is commanded that he cause the said ——— to have her full seisin of her aforesaid third part of the tenements aforesaid, with the appurtenances, without delay, to hold to her in severalty, by metes and bounds, &c. and in what manner he shall have executed that writ, he make known to our lord the king's justices here on ———; the sheriff is also commanded, that by the oath of honest and lawful men of his county, he diligently inquire if the said ——— died seised of the said tenements, with the appurtenances, in fee simple or in fee tail, and if, on such inquiry, he shall so find, then that he, by their oath, inquire how much the said tenements, with the appurtenances, are worth by the year, in all issues beyond reprisals, according to the true value of the same, and how much time is elapsed from the time of the death of the said ———, and also what damages the said J. W. hath sustained, as well on occasion of the detaining of her said dower, as for her costs and charges by her laid out about her suit in this behalf, and that he make known the inquisition he shall take thereon to our said lord the king's justices, at the term aforesaid, under his seal, and the seals of those by whose oath he shall take that inquisition, together with the writ to him therefore for that purpose directed, the same day is given to the said J. here, &c. At which day comes here the said ———, by her attorney aforesaid, and the said sheriff hath not sent the said writ, nor hath he done any thing thereon. Therefore, as before, the said sheriff is commanded that he cause the said ——— to have her full seisin, &c. to hold, &c. and in what manner, &c. he make known, &c. from the ——— day of ———, in ———, and that by the oath of, &c. he diligently inquire, in form aforesaid, and that he make known the inquisition he shall take thereon here at the term aforesaid, under his seal, &c. together with, &c. the same day is given to the said J.

Continuances
and judgment.

Award of execution,
&c.

here, &c. to have her full seisin of the aforesaid third part, with the appurtenances, without delay, to hold to her in severalty, by metes and bounds, and in what manner you shall have executed this our writ, do you make known to our justices at Westminster, on ———. We also command you, that by the oath of honest and lawful men of your county, you diligently inquire if the said ——— died seised of the said tenements, with the appurtenances, in fee simple or in fee tail, and if on that inquiry you shall so find, then that you by their oath, inquire how much the said tenements, with the appurtenances, are worth by the year, in all issues beyond reprisals, according to the true value of the same, and how much time is elapsed from the time of the death of the said ———, and also what damages the said J. W. hath sustained, as well on occasion of the detaining of her said dower, as for her costs and charges by her laid out about her suit in this behalf, and that you make known the inquiry you shall make thereon to our justices at Westminster, at the term aforesaid, under your own seal, and the seals of those by whose oath you shall make that inquiry, and this writ. Witness, Sir ———, knight, at Westminster, the ——— day of ———, in the ——— year of our reign.

DUPLICITY. See title **DUPLICITY** in **PLEADING**. Also title **PLEAS** and **PLEADING**.

EJECTMENT. *Of the Action of Ejectment.*

What it is.

A mode of trying a title to corporeal, and also to certain incorporeal estates, of which possession can be given in pursuance of a legal judgment.

This head admits of being treated under the following sections and sub-sections, viz.

- I. Of the action of ejectment, generally.
- II. Considerations previously to commencing proceedings, necessary on the part of the lessor of the plaintiff, or real claimant.
- III. Of the declaration in ejectment.
 - (a) Parties thereto.
 - (b) Notice.
 - (c) Service.
 - (d) Amendment, &c.
- IV. Of the motion for judgment against the casual ejector. Trial Verdict.
- V. Of the proceedings after verdict.
- VI. Of the defence. Appearance.
- VII. Of the proceedings by ejectment on other than ordinary occasions.
 - (a) Re-entry under stat. 4 G. II. c. 28.
 - (b) Vacant possession.
 - (c) Mortgagee.
- VIII. Of consolidation of several ejectments. Costs. Bail in error.
- IX. Practical Directions on the part of the plaintiff, generally. K. B.
- X. The like, where the defendant does not appear to confess lease, entry, and ouster.

- XI. The like on other than ordinary occasions.
 - (a) Re-entry under stat. 4 G. II. c. 28.
 - (b) Mortgagee.
 - (c) Vacant possession, &c.
- XII. Practical Directions on the part of the defendant, generally, K. B.
- XIII. The like, on the part of the defendant, on other than ordinary occasions.
 - (a) Re-entry under stat. 4 G. II. c. 28.
 - (b) Mortgagor.
- XIV. Practical Directions on the part of the plaintiff, generally, C. P.
- XV. The like on the part of the defendant, C. P.
- XVI. Forms.

I. OF THE ACTION OF EJECTMENT, GENERALLY.

This action may be commenced in an inferior court, but *certiorari* lies to remove the cause from an inferior jurisdiction into K. B., and it need not be removed by *habeas corpus cum causa*. Goodright, *d. Sadler v. Dring*, 2 D. & R. 407. 1 B. & C. 255. S. C.

It would be to little purpose in this place to inquire how far necessity or expediency gave rise to this proceeding; or wherefore it has obtained that universal preference and approbation which it most unquestionably possesses.

It owes its present form to Rolle, L. C. J. who, in the time of the Commonwealth, a period distinguished by a sound and radical reformation in the practical administration of the law, became chiefly instrumental in the adoption, or rather reformation, of a practice, by which questions of title respecting estates might be divested of the intricacies, delays, and expences then, and long before, incidental to the prosecution of the ancient remedies for the recovery of possessions wrongfully withheld, and some of which had also become incidental even to the then modern proceeding by ejectment.

Most of the purposes originally proposed to be attained by former remedies, in case of disputed titles, are neatly attained by this substitution for them; the question of title is now submitted to the consideration of the jury, unclogged and unobscured with technical and inconvenient, if not ruinous nicety; or it is referred to the decision of the court upon facts independently of, and unconnected with the verbal subtleties of ancient pleading. Facts are to be met by facts, and right by right.

But whatever opinion may be formed upon the origin or object of this proceeding; however, in speculating upon the administration of justice, it may be presumed that something better, something less absurd, might have been suggested; yet it must be admitted, that upon the proceeding by ejectment, with all its faults, has been grafted a practical code for the recovery and defence of possessions: and that what hath been, in effect, said of the common insurance policy, may be well applied to the proceeding by

Origin of the present form of proceeding.

How far ejectment a substitute for former remedies.

However exceptionable in its form, it has given rise to a practical code for the trial of disputed possessions.

EJECTMENT; I. *Of the Action of Ejectment, generally.*

ejectment; namely, that out of very exceptionable materials, a series of principles have been deduced, by an attention to which, we are enabled *à priori* to determine the right of a party claiming or withholding a possession. It might be presumed, that an authority competent to create or to sanction fiction for attaining an useful end, might have attained the same end by a series of truths instead of falsehoods. Although inquiry directed to this particular question, might amuse and instruct, our practical knowledge would be assisted little farther than by such inquiry supplying us with readier means of comprehension of the grounds and reasons of the mysterious and fictitious contrivances which effectually disguise the action of ejectment from superficial observers. To such persons this action may suggest nothing but absurdity, feeble incongruity, and nonsense. But insight into the nature of this action, and indeed into the grounds and principles of all legal fiction, may satisfy an unprejudiced inquirer, that in the prosecution and claim of civil rights, the essential purposes of jurisprudence will be better and more effectually obtained by the adoption of some general form, which, however faulty in each particular case, shall be generally applicable to most cases; rather than by a formal statement of every case according to its own particular circumstances.

I shall endeavour to familiarize this proceeding.

Statement of the proceeding; the declaration.

In order to obtain his rightful inheritance, wrongfully withheld by one having no title, except possession, the claimant must not even use his own name as plaintiff. In the form adopted as the commencement of the action, a palpable fiction must be alleged; namely, that he granted or leased a term of years to a person of whom (as his tenant) the claimant was ignorant until the instrument of his legal claim informs him that to such a person he did actually grant such lease; it must also be alleged that such person did, by virtue of such lease, enter upon the very land so claimed; that another person, equally unknown to the claimant, ousted, or, with force, removed the lessee from the premises so enjoyed by him by virtue of the lease. For this wrong done *by this* imaginary person to *this* imaginary person, this last institutes his action of ejectment; and the declaration, or first proceeding, states the foregoing as the *facts* of the case. On the face of the same instrument of legal process, the imaginary person who ousted him to whom the lease was granted, is made to intimate to the real tenant in possession of the lands, whose name now first appears, that he who has ousted, understands him who is the tenant, to be in such actual possession, and also informs the tenant that the ousterer is sued for the wrong he has done, and he gives the tenant to understand, in writing, that the ousterer has neither title or claim to the farm or premises, and therefore advises the tenant duly to appear in court, and defend his own title; and which if he do not, judgment will be pronounced against him; and that he who is so in possession will be turned out.

The notice subjoined.

By the process or declaration, as it is called, or notice subjoined thereto, a time is limited for the tenant in possession to avail himself of this intimation, and to adopt the measure of precaution recommended to him by his loving friend as he usually designates

himself; namely, to appear himself and defend his title; he does appear therefore, if he have title or means to resist the claim set up; he appears in court by some attorney, as advised by his loving friend, and prays of the court to be made defendant in the place of the person who gave him this friendly admonition. This being a favour, granted by the court, is not to be obtained without submitting, as it is called, to certain terms, namely, the confessing that to be true which no confession can make true, that is to say, that such a lease was made; that such entry was also made, and that such an ouster or forcible expulsion was committed as is specified in the process or declaration to have been made. He assents to all these facts, and his assent being recorded by the court, the tenant or opposing claimant, is allowed to defend himself against the claim set up by his opponent. This assent being recorded becomes also the subject of a rule or order of the court, called the consent rule*.

A remarkable inconsistency appeared until lately between what is admitted to be true on the face of this rule, and what the lessor of the plaintiff must afterwards prove; for it was essential that he prove, in terms, that possession by the defendant, which, by his confessing ouster, he admits. *Goodright, d. Balch v. Rich, 7 T. R. 327.*

But this case is now by *R. M. 1 G. IV.* rendered a dead letter, for that rule after reciting that by the common consent rule in actions of ejectment the defendant is required to confess lease, entry, and ouster, and insist upon his title only; and that in many instances of late years defendants in ejectments had put the plaintiff after the title lessor of the plaintiff had been established, to give evidence that such defendants were in possession at the time the ejectment was brought of the premises mentioned in the ejectment, and for want of such proof had caused such plaintiffs to be nonsuited; and that such practice was contrary to the true intent and meaning of such consent rule, and of the provisions therein contained, for the defendants insisting upon his title only, orders, that from thenceforth in every action of ejectment the defendant shall specify in the consent rule for what premises he intends to defend, and consent in such rule to confess upon the trial that the defendant, if he defend as tenant (or in case he defend as landlord, that his tenant) was at the time of the service of the declaration in the possession of such premises; and that if upon the trial the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed.

* But where one tenant in common brings ejectment against another, who procures himself to be made defendant instead of the tenant in possession, the course is for such tenant in common, proposing himself to be so made defendant, to apply to the court upon an affidavit of the facts, for a rule to shew cause why he may not ap-

pear and defend in place of the tenant, and confess with lease and entry but not ouster; and this rule being of course made absolute, the plaintiff thus being put to prove ouster, cannot, unless he be able to do so, safely proceed to trial, but is left to his bill in equity, in the nature of a writ of partition.

The consent rule.

Yet, until lately possession by tenant was to be proved.

EJECTMENT; I. *Of the Action of Ejectment, generally.*

Where the real tenant need not appear.

A comprehension of the nature of this action acquired late in the clerkship.

Further explanation as to the parties appearing on the declaration.

In what cases and what of the above statement fictitious or not.

It is thus found that by a process very circuitous in expression, and so far abounding in mere invention, the real party may be brought before the court, and his claim and also that of the person who is stated to have originally made the lease to the plaintiff in the cause, are thus or collaterally submitted to a jury, under the following title of the cause, viz. Doe (an imaginary person) on the demise of ——— the real claimant against the now defendant; the person withholding the rightful possession, or presumed rightful possession. The other imaginary person, who it was stated, committed the grievance or ouster, it will be observed, has disappeared, and a real counter-claimant takes his place. It may be right here to observe, to prevent farther confusion, that the actual tenant need not, of necessity, be the defendant, but that any one who will oppose the plaintiff's title under the demise, which he sets up to have been made to him, will be allowed to be made defendant, provided he join in the consent rule above stated.

One of the last acquirements of the student, is, I believe, a due comprehension of the theory of the action of ejectment, and though the forms may be explained and an account rendered of their use and origin, farther explanation may be necessary for their easier comprehension.

It will appear that four parties are mentioned in this proceeding, in its commencement, viz. 1. The plaintiff usually, and more soberly, called John Doe, or John Fenn, but in some cases called Peaceable; in some Negative; in some Fairclaim; in some Goodright; in some Holdfast; in some Goodtitle; according to the playfulness or fancy of the practitioner; but by the rule of 1654, the lessee must not be an attorney. This plaintiff, therefore, has no real existence*. 2. The lessor of the plaintiff; this is the party who really sues. 3. The casual ejector, or person declared against as having done the wrong of which complaint is made, but who soon gives place, and disappears from the conflict. 1. The casual ejector, usually named Richard Roe or Richard Feun, is recognized under the names of Troublesome, Letgo, Thurstout, Badtitle; just as their opponents derived name from the fancy of the practitioner. 4. The tenant or person really disputing the title entering into the consent rule, and thus becoming the defendant in his stead.

The above statement little differing from that 3 *Comm.* 201. will, I believe, be found consistent with the practical course of the proceeding, where a visible tenant is in possession of the premises claimed; but it may happen that no tenant may be in actual possession of the land, in which case many of those facts which are above only presumed to have occurred, must have had actual existence; the lease or demise for a certain term must be duly sealed and made, and that too *upon* the disputed land, by the lessor of the plaintiff to some real or nominal plaintiff; and thus an actual entry is made; actual ouster must also be committed by some person, who thus becomes defendant.

* Regardless of the express reprehension of the court; *Anon. 6 Mod.* 153; which reprehension is also cited and repeated in 3 *Comm.* 206. It being

said that the plaintiff should be some real person, in order to enable a defendant to recover his costs,

It is more than a century and an half since the dispensation from the necessity of those more formal proceedings is traceable in practice, even in cases where there was an actual tenant: but as the action itself is a mere fiction, so is the practice with relation to the action, and so is the whole of its modifications.

Where the fore-mentioned formalities dispensed with.

It is indeed rather querulously stated by a very learned author, who has treated this particular action, "that it is still in a fluctuating state, yet for his own part he cannot avoid observing, that in the general practice of the law the lasting advantages resulting from stability, seem to be unknown; advantages which must overbalance the slow improvement of gradual correction;" but in practice, as settled so far, at the present period, I believe little difficulty exists on the ground of uncertainty; yet at the time of the first publication of "The history of the Legal Remedy by Ejectment," it might, and no doubt did, exist.

Quare, as to uncertainty in the practice of this action.

The prosecution of real actions has, in a very great measure, been superseded by the almost universal adoption of the remedy by ejectment. The grave consistency which pervades its practice may provoke whilst it excuses a smile; but when the great advantages that have resulted from the adoption of the fiction, however apparently absurd in itself it is, are contemplated, the legal ingenuity which framed, and the laudable pertinacity which retains it, can scarcely enough be commended.

Conclusion of the introductory observations.

Of this remedy Lord Mansfield, *Ld. C. J.* declared that he had it at his heart to have the practice clearly settled upon large and liberal grounds, for that public utility had adopted it in lieu of almost all real actions, which were embarrassed and entangled with a thousand niceties.

The same noble lord, in describing the action of ejectment, remarked, that "in form an ejectment is a trial between two to dispossess a third by a sham suit and judgment," and that "the artifice would be criminal, unless the court converted it into a fair trial with the proper party." 3 *Burr.* 1294.

II. CONSIDERATIONS PREVIOUSLY TO COMMENCING PROCEEDINGS, ON THE PART OF THE LESSOR OR THE PLAINTIFF, OR PERSON ENTITLED.

The first question that presents itself to the consideration of the practitioner is, whether his client be or not competent to prosecute it by means of ejectment.

First consideration on the part of the practitioner, whether the client be competent to bring ejectment. Who may not.

Any person in whom the legal title is, must prevail in ejectment. *Da Costa v. Wharton*, 8 *T. R.* 2.

But a mere equitable title is insufficient to support an ejectment. *Doe, d. Bowerman v. Sybourn*, 7 *T. R.* 2. *e. g.* one tenant in common against another. See note, page 444, *ante*.

It may be sufficient for all practical purposes to state that the remedy being possessory is only competent where the lessor of the plaintiff may enter. *Taylor, ex dimiss. Atkins, Esq. v. Horde, Esq.* 1 *Burr.* 60. 119. therefore it is always necessary for the plaintiff to shew that his lessor had a right to enter by proving a possession within twenty years, or accounting for the want of it. *Ibid.* As to this point, or as to the lessor of the plaintiff, see *post*.

Demand of possession under stat. 1 Geo. IV.

It is next expedient to consider what if any acts should be done by or on the part of the claimant precedent to the commencement of the action. As, whether it may be necessary to demand possession; or rent. As to what previous demand of possession was deemed sufficient, within the statute 1 G. IV. c. 87. it has been lately determined, that where landlord enters into an agreement with a tenant on a day specified (1815), to grant him a lease of certain premises for a term also specified, expiring in 1822, the agreement to take effect from a day previous in 1814, from which day tenant had been in possession, yielding 2s. 6d. yearly, and in case he held over after the term, the tenant was to pay 40s. per diem for every day he retained possession; the lease never being granted, and at the expiration of the term tenant held over after having been served with a nine months' notice to quit at the end of the year for which he held, which should first happen after the expiration of half a year from the date of the notice; he being then served with a written demand of possession, and the same paper notifying to him, that if he did not yield quiet possession an ejectment would be brought, It was held, 1st. That the tenant was not to be treated as a tenant from year to year; and 2d. That the demand of possession was sufficient notice within 1 G. IV. c. 87. so as to entitle the plaintiff to the benefit of the undertaking, and security required by that statute. *Doe, d. Anglesey v. Roe*, 2 D. & R. 565.

And where demand of possession was held unnecessary, it appearing that by marriage settlement husband had the wife's estate for life, with power to grant leases for 21 years, but no longer. In breach of the power he granted a lease to A. for ninety-nine years, determinable upon lives, wife survives him and conveyed the fee to B., and in the conveyance is recited the lease to A. who is recognized as then being tenant in possession of the estate at the yearly rent reserved, B. brings ejectment against the assignees of the lease, it was held, that the lease being void, and the recital being only matter of description no demand of possession was necessary to sustain the action. *Doe, d. Biggs v. White*, 2 D. & R. 716.

And where demand of rent appeared to be otherwise necessary precedent to the bringing ejectment, it was ruled that such demand of rent from lessor to lessee, though made of a stranger, if made upon the land, is a sufficient demand, and need not be general to sustain ejectment for a forfeiture for non-payment of rent, being lawfully demanded. *Doe, d. Brook v. Brydges*, *Id.* 29.

Another question presenting itself is, whether the property claimed be recoverable in this action.

To mention the different descriptions of property so recoverable, would extend this title very far beyond practical utility. It may be sufficient to state that ejectment may be brought for whatever estate can be entered upon, and which is therefore capable of being delivered in execution. 2 *Bac. Abr.* 417. and generally for whatever estate a demise may be made. Thus a boiler of salt, 1 *Lea*. 114. a coal-mine, *Comyn v. Kineto*, *Cro. Jac.* 150. cited 1 *Doug.* 305. *pro prima tonsura*, or first grass that grows on the land every year. *Ward v. Petifer*, *Cro. Car.* 262. So also *pro herbagio*, or the herbage of the soil. *Hard.* 301, 303. So also *pro*

What recoverable.

pastura centum ovium; so much land as will feed 100 sheep; however doubtful this might have been from the case in *Hard. 58.* several later decisions warrant the position. See *Burt v. Moore, 5 T. R. 329.* where it was decided that a demise of the milk of twenty-two cows, to be provided by the lessor, and to be fed at his expence, on certain closes belonging to the lessor; he covenanting that the lessee might turn out a mare, and that no other cattle should be fed there, enabled the lessee to distrain other cattle of the lessor doing damage there; for that by such demise the separate herbage and feeding of those closes passed to him, the lessee. The inference need hardly be drawn that a demise of the pasturage necessarily carries with it a demise of the land supplying that pasturage, and that ejectment may well lie therefore against any unentitled holder.

So also *pro rectoria*, a rectory, *Latch. 62,* and *pro capella*, a chapel, under the name of a messuage, *2 Bac. Abr. 418.*

Although it may appear that ejectment will lie for whatever may be demised, yet it will be seen in the instance of a rectory, that it will also lie for the possession of every estate not demisable; for instance, in the *King v. the Bishop of London, 1 Wils. 14.* it was said that ejectment lies for a prebendal stall.

By stat. 32 H. VIII. c. 7. it lies for tithes in the hands of a lay improPRIATOR. That statute enacts, that every lay person having any estate of inheritance, freehold, right, term, or interest in tithes, and being thereof disseised, ousted, wronged, or otherwise kept from the same, shall have his remedy in the courts of law for them in like manner as for lands.

But then it must be considered that an ejectment lies only for tithes in kind, and not for a modus. *Ibid.*

As on *elegit*, the sheriff only delivers legal possession of the lands. To obtain actual possession the plaintiff must proceed by ejectment. *Per* Lord Hardwicke, in *Lowthall v. Tomkins, 2 Eq. Ca. Abr.* and the same point recognized in *Taylor v. Cole, 3 T. R. 292. 295.*

It might be useful to mention some of the cases where it was held ejectment could not be maintained, but it will perhaps be enough to state, as a general principle in this place, that where estate is in its nature incorporeal, or exists merely in grant, ejectment will not lie. *Things quæ neque tangi nec videri possunt. Co. Lit. 9. a.* Things sensible neither to touch nor sight.

Such things may, however, be attached to corporeal things, and then ejectment will lie; as for common appurtenant or appendant to certain lands, for in this case possession, as was said by the court, may be given by giving possession of the lands to which it is so appendant or appurtenant. *Newman v. Holdmyfast and Others, 1 Str. 54.*

But for a rent. *Cro Jac. 146. nor de pannagio*, or the feedage of swine on mast, ejectment will not lie, for it is only a privilege to take the mast. *Pemble v. Sterne, 1 Sid. 416;* the reason is assigned in the report of the same case, *1 Lev. 212.*

Having examined thus far, the proceedings might be commenced forthwith; but there is another preliminary consideration which in many cases is necessary to be had; this is the notice to be given. Notice to quit.

EJECTMENT; III. *Of the Declaration, Notice, Service, &c.*

given to the person withholding the rightful possession, to quit, and where this is necessary, and where it is not, might be next treated.

Upon this head, so much falling within the course of daily practice, it might be useful to be rather full; but it is more consistent with the plan of this work to treat it separately; more particularly so as it is not *necessarily* connected with ejectment. See therefore, title NOTICE TO QUIT.

But it may be mentioned that the lessor of the plaintiff is not a proper party to release this action. *Doe, d. Byne and Others, v. Brewer and Others*, 4 M. & S. 300.

III. OF THE DECLARATION IN EJECTMENT, PARTIES THERETO, NOTICE, SERVICE, &c.

First step, the preparing declaration.

The first step in the commencement of the action of ejectment is the preparing the declaration.

An explanation of the fictitious frame of the declaration will have appeared, page 520, *ante*. It will be evident that the declaration itself is founded on a supposed trespass.

How entitled.

It must be entitled of the term preceding the delivery; and this, although the title on which it may be founded, shall not have accrued until the succeeding vacation. See *Tunstall v. Brend*, 2 Vent. 174.

The venue.

The venue is local; that is to say must be laid in the county where the estate lies or is situated.

Description of premises.

Great attention used formerly to be given to the duly describing the premises for which the ejectment was brought, by reason that the sheriff might be certainly informed what to deliver under the writ of possession; but it is now settled that the lessor of the plaintiff must shew the sheriff the premises of which, under the writ, he is to deliver possession; and such lessor is to take such possession (at his peril) for if he take more than he has duly recovered the court will, in a summary way, set it right. *Cottingham v. King*, 1 Burr. 630. and Lord Mansfield, Ld. C. J. said it had been determined over and over that such exact and precise certainty is not requisite in ejectments as in a *precipe*. *Connor v. West*, 5 Burr. 2672. but it must not from these cases be inferred, that some legal description is unnecessary.

It seems sufficient, if the premises be described in words of a certain import and known signification, as a house for a message; or a chamber in the second story; so for part of a house in *A. Sullivaine v. Seagrave*, 2 Str. 695. but an ejectment *de coquina*, a kitchen it is said is naught; for, though the word is well enough understood, yet, because between judgment and execution the kitchen may be changed, the sheriff hath not certainty enough to direct him; but a second story may contain more chambers than one, in which case the sheriff would have as little to direct him as in the case of the kitchen, and therefore the good sense of the rules in 1 & 5 Burr. above mentioned, will be evident, and probably even a tenement described as a kitchen would be held good at the present day, especially after verdict.

Where one garden, one house, and five acres of land, are intended to be recovered, it is usual to include them in a greater num-

ber, as two messuages, two gardens, and ten acres of land, with the appurtenances, in a certain parish, in a certain city or town, or in a certain town, in a certain county.

The premises being said to be in Farnham, and proved to be at Farnham Royal, is not a fatal variance, unless it be shown that there are two Farnhams. *Doe, d. Tollett v. Salter*, 13 *East*, 9.

It is usual to refer to the parcels specified in the latest deed, or to any other authentic description of the premises which may be in the parties' possession; and if he have none, the practitioner may procure a view to be made of the premises claimed; and of what they consist being noted, he will be enabled sufficiently to describe them, recollecting that "tenement" though a word of large import, may not be used as a word of description in alleging or describing the premises in the declaration.

Where water or a water-course is to be recovered, it may be described as so many acres of land covered with water.

When lands are to be recovered it is usual to distinguish their quality, use, or agricultural appropriation; as ten acres of pasture, ten acres of meadow, ten acres of wood, as well as to mention some quantity.

The next point for consideration is, when and for what period the demise is stated to have been made. Statement of demise and term.

Although the whole proceeding be a fiction, yet the law is tender of consistency in its fictions; hence the demise must be stated in the declaration to have been made sometime after the claimant's title accrued, and the commencement of such demise must be laid before the *ouster* by the defendant. *Goodgaine v. Wakefield*, 1 *Sid.* 8.

The demise was laid by the heir the day his ancestor died, and held good, for the ancestor might have died at five in the morning; the heir might have entered at six, and the demise or lease might have been made at seven. *Roe, d. Wrangham v. Hersey*, 3 *Wils.* 274.

It is usual in practice to state the demise to have been made, *e.g.* the 2d January, to commence on the 1st, and that the *ouster* took place the 3d.

The term stated to have been granted is usually seven years; but it may happen that final judgment may be deferred till a time subsequent to the expiration of this term, and it therefore becomes of consequence that where the possibility of this fact can be contemplated to specify a longer term, for after judgment in ejectment had been signed in the year 1763, in which year the Court of Chancery granted an injunction to stay execution, and nothing appeared to have been done in the cause since K. B. refused to enlarge the term in the declaration for the purpose of enabling a descendant of the original plaintiff to sue out a *scire facias* in order to revive the judgment, and take out a writ of possession against the heir at law of the original defendant. *Bradney v. Hasselden*, 2 *D. & R.* 227. 1 *B. & C.* 121. *S. C.*

The next question that occurs in the framing the declaration is, as to by whom the demise is stated to be made, or who, in technical language, is to be made the lessor of the plaintiff. See also page 520, *ante*. If the title be in one person, the declaration Of the lessor of the plaintiff.

EJECTMENT; III. *Of the Declaration, Notice, Service, &c.*

liable to be made defendant, and his conduct is evidence to go to the jury to presume that he is tenant in possession, unless the fact is rebutted by other evidence. *Doe, d. James v. Staunton*, 1 *Chit. R.* 119.

Judgment granted against the casual ejector, though the real defendant's name was inserted at the beginning of the declaration, instead of the casual ejector, but it seems better to amend. *Anon. Id.* 573. n.

Needs not be in the name of plaintiff.

The next formal point to be mentioned, is the notice subjoined to the foot of the declaration. It needs not be in the name of the plaintiff, but if in the name of the lessor of the plaintiff, or even any other person, the court will permit the rule for judgment against the casual ejector to be drawn up. *Goodtitle, d. Duke of Norfolk v. Notitle*, 5 *B. & A.* 849.

The notice to appear.

It must be directed to the tenant in possession, and where, in the case of several tenants, the name of each was prefixed to the notice served on him, instead of all, it was held that only one rule was necessary on motion for judgment against the casual ejector. *Roe, d. Burlton v. Roe*, 7 *T. R.* 477.

By statute 1 G. IV. c. 86. s. 1. when the term or interest of any tenant then or thereafter holding under a *lease or agreement in writing*, any lands, tenements, or hereditaments, for any number or term of years certain, or from year to year, shall have expired or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person; and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the declaration to address a notice to such tenant or person, requiring him to appear in the court in which the action shall have been commenced, *on the first day of the term* then next following; or if the action shall be brought in Wales, or in the counties palatine respectively, then on the first day of the next sessions or assizes, or at the court day or other usual period for appearance to process then next following (as the case may be), there to be made defendant, and to find such bail, if ordered by the court, and for such purposes as next specified.

And upon the appearance of the party at the day prescribed, or in case of non-appearance, on making the usual affidavit of service of the declaration and notice, the landlord producing the lease or agreement; or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit (as the case may be), and that possession has been lawfully demanded in manner aforesaid, to move the court for a rule for such tenant or person to shew cause, within a time to be fixed by the court on a consideration of the situation of the premises, why such tenant or person in possession, upon being admitted defendant, besides entering into the common rule and giving

the common undertaking, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment; to be entered up against the real defendant, of the term next preceding the time of trial; or if the action shall be brought in Wales, or in the counties palatine respectively, then of the session, assizes, or court-day (as the case may be) at which the trial shall be had; and also why he should not enter into a recognizance by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action; and it shall be lawful for the court, upon cause shewn, or upon affidavit of the service of the rule in case no cause shall be shewn, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed upon a consideration of all the circumstances, to give such undertaking, and find such bail, with such conditions, and in such manner as shall be specified in the said rule, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the court to enlarge the time for obeying the same, then, upon affidavit of the service of such order, an absolute rule shall be made for entering up judgment for the plaintiff.

By section 3, in all cases in which such undertaking shall have been given, and security found as aforesaid, if upon the trial a verdict shall pass for the plaintiff, but it shall appear to the judge before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, the judge may order the execution of the judgment to be stayed absolutely, till the fifth day of the term then next following, or till the next sessions, assizes, or court-day (as the case may be), which order the judge shall in all other cases make upon the requisition of the defendant, in case he shall forthwith undertake to find, and on condition that within four days he shall actually find security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure, produced or made (if any) upon the premises, and which may happen to be thereupon from the day on which the verdict shall have been given to the day on which execution shall be finally be made upon the judgment, or the same be set aside, as the case may be: proviso that said recognizance shall immediately stand discharged and be of no effect in case a writ of error shall be brought upon such judgment, and the plaintiff in such writ shall become bound with two sufficient sureties unto the defendant in the same, in such sum and with such conditions as may be conformable to the provisions respectively made for staying execution on bringing writs of error upon judgments in actions of ejectment by English stat. 16 & 17 Car. II. and Irish stat. 17 & 18 Car. II. which acts are respectively intituled "*An act to prevent arrests of judgment and superseding executions.*"

By sec. 4, all recognizances and securities, entered into pursuant to the act, shall be taken respectively in such manner and by and before such persons as are provided and authorized in respect of

EJECTMENT; III. *Of the Declaration, Notice, Service, &c.*

recognizances of bail upon actions depending in the court in which any such action of ejectment shall have been commenced, and that the officer of the same court with whom recognizances of bail are filed, shall file such recognizances and securities, for which respectively the sum of 2s. 6d. and no more shall be paid; but no action or other proceeding shall be commenced upon any such recognizance or security, after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord.

By sec. 2, wherever thereafter it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant; that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry and ouster; but the production of the consent rule and undertaking of the defendant, shall in all cases be sufficient evidence of lease, entry, and ouster; and the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein; and the jury on the trial finding for the plaintiff, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits. The said act not to bar landlord from bringing trespass for the mesne profits to accrue from the verdict or the day so specified therein down to the day of the delivery of possession of the premises recovered in the ejectment.

By sec. 6, in all cases where the landlord shall elect to proceed in ejectment under the act, and the tenant shall have found bail as ordered by the court, then, if the landlord upon the trial of the cause, shall be nonsuited, or a verdict pass against him upon merits, there shall be judgment against him with double costs.

By sec. 7, the act not to prejudice or affect any right of action or remedy which landlords already possess in any of the cases therein-before provided for.

By sec. 8, the act shall extend to all parts of the united kingdom of Great Britain and Ireland, except Scotland.

By sec. 5, the defendant may not remove any action of ejectment, commenced by a landlord under the act, from any of the courts of Great Session in Wales to be tried in an English county, unless such court of Great Session, shall be of opinion that the same ought to be removed, upon special application to the court for that purpose.

It will be observed, that the practice mentioned in the statute is confined to cases of tenancy *under lease or agreement in writing*. In other cases, therefore, it is still necessary to be guided by the general practice settled, without reference to the late act.

But in order that the two modes of practice may not be confounded, it seems advisable to advert in this place more in detail to the late statute; that is to say, to state all its provisions, together with the cases arising thereon, previously to making mention of the cases guiding the practice before the passing of such statute. For it will be recollected, that in cases of tenancy not under lease or agreement in writing the statute alters nothing; and moreover one of its provisions is, to leave the landlord to pursue the new or the old remedy by ejectment, at his election.

The time within which the undertaking and security required to be given, is to be fixed by the court at the time the rule under that statute is to be granted. *Doe, d. Anglesey v. Brown*, 2 D. & R. 688.

Upon a rule calling upon the tenant to enter into a recognizance under stat. 1 G. IV. c. 87. it is unnecessary to express in the rule *nisi*, the amount of the security required. *Doe, d. Phillips v. Roe*, 5 B. & A. 766.

In proceeding in ejectment under the stat. 1 Geo. IV. c. 87. s. 1. the court, on making a rule absolute (no cause being shewn) for the tenant's undertaking to give the plaintiff judgment, to be entered up against the real defendant, and to enter into a recognizance in a *reasonable sum*, conditioned to pay the costs and damages which should be recovered by the plaintiff in the action, ordered the tenant to appear in the next succeeding term, to find such bail as were specified in the former rule; and on no cause being shewn to that order, they directed the rule for entering up judgment for the plaintiff to be made absolute. The court can only give a reasonable sum for the costs of the action, and not for the mesne profits, the amount of which must be ascertained by the prothonotary. *Doe, d. Sampson v. Roe*, 6 J. B. Moore, 54.

After a rule granted under 1 Geo. IV. c. 87. in a cause entitled "*Doe, &c. v. Roe*," to which the tenant in possession appeared, judgment was entered up and execution taken out against the tenant by *name*: Held, no irregularity. *Doe, d. Anglesey v. Brown*, 3 D. & R. 230.

In relation to appearance, and of course consent rule, when proceeding under the statute, it has been ruled, that demise in writing of apartments for a period of *three months* certain, comes within the meaning of the words of stat. 1 G. IV. c. 87. "An act for enabling landlords more speedily to recover possession of lands and tenements, unlawfully held over by tenants, where a party holds for any term or number of years certain, or from year to year." If such an instrument of demise requires either an agreement or lease stamp, within the provisions of stat. 55 G. III. c. 184. it is not necessary that it should be stamped before the rule is granted under 1 G. IV. c. 87. it being time enough at any time before the trial of the ejectment. The rule *nisi* under that statute need not specify all the particulars thereby required, as the court may mould the rule conformably to its requisites on shewing cause. *Doe v. Roe*, 1 D. & R. 433.

When the tenant in possession has just died, and a servant is in possession, the plaintiff should endeavour to get possession, and if the servant resists, he should be treated as tenant. 1 Chit. R. 574.

EJECTMENT; III. *Of the Declaration, Notice, Service, &c.*

Where several tenants had been duly served with a copy of a declaration in ejectment, judgment may be entered against the casual ejector, although the notice at the foot of the declaration was not addressed to any or either of such tenants. *Doe, d. Pearson v. Roe*, 5 *J. B. Moore*, 73.

The second name of the tenant in possession, both in the declaration and notice in an action of ejectment, may be in initials. *Anon.* 1 *Chit. R.* 573.

Yet it appears to have been ruled, that the notice to appear in ejectment must contain the christian name of the tenant, in order to ground the rule for judgment; and it is not sufficient to swear to the identity of the person served. *Doe v. Roe*, *Id.*

But a notice at the bottom of a declaration in ejectment, affixed to the door of an empty house, addressed to the personal representatives of the deceased tenant generally, was held insufficient; as, if there had been representatives who had taken possession, they should have been addressed by name; if not, the lessor of the plaintiffs should have proceeded as in case of a vacant possession. *Doe v. Roe*, 1 *J. B. Moore*, 113. And see 1 *Chit. R.* 162.

And where the landlord intends to avail himself of this statute, it must be signed by himself, and not by the casual ejector. *Anon.* 1 *D. & R.* 435.

In cases to which the statute does not apply, viz. where the demise is not in writing, a time for the appearance of the nominal defendant is specified in this notice, and the proper insertion of this time depends upon the *venue*, or whether the premises be situated in London or Middlesex, or in any other county. If in London or Middlesex, the time specified for the appearance is a day certain, namely, the first day of the term following the service of the declaration; if situated in any other county, the time mentioned is the whole of the next or succeeding term generally. And it has been ruled, that in a notice in a declaration of Trinity term to appear in Hilary term, was good. *Doe, d. Clark v. Roe*, 4 *Taunt.* 738.

This notice may purport to be signed by the nominal plaintiff. *Hazlewood v. Thatcher*, 3 *T. R.* 351. or at least it is not an irregularity sufficient to set aside the proceeding.

Of the service of
the declaration.

The declaration being complete, a copy may be served, delivered, or affixed to the premises, as the case may require; and as it is a point upon which the practitioner should be very fully informed, I shall collect in this place some earlier and some later decisions relating to it. And see what relates to the affidavit, next section.

It should be regularly engrossed, and on one side of the stamped paper only; for it has been held, that service of seventeen office copies of declarations in ejectment, written on both sides, and delivered to as many tenants in possession, was irregular. *Doe, d. Irwin v. Roe*, 1 *D. & R.* 562.*

It must be served *before* the *essoin* day of the term, either in town or country. *Doe v. Roe*, 1 *D. & R.* 563.

* This decision being founded upon mere fiscal principle, is not, since the late most salutary statute repealing the stamps on law proceedings, pertinent I conceive.

But it seems to have been ruled, that service before the essoign day, on servant or child of tenant in possession, is sufficient, unless tenant has acknowledged he received the declaration before the essoign day. 1 *Chit. R.* 118 (n.)

But the delivery on a Sunday, or on an essoign day, is bad.

And if served upon the servant on a Saturday, with an acknowledgment by the tenant on a Sunday, it is insufficient. *Goodtitle, d. Mortimer v. Notile, 2 D. & R.* 232.

But where the service was before that day, and the explanation of it to the tenant in possession did not take place till after, Held, that the lessor of the plaintiff was entitled to judgment. *Doe v. Roe, 1 D. & R.* 563.

The tenant himself should be served, and if so, it is not material that the service be on the premises. *Doe, d. Morland v. Baylis, 6 T. R.* 765.

And service on one of two joint tenants, is sufficient; but the tenant must be served, and not the servant. 1 *Chit. R.* 121.

But service of the declaration on one of two tenants in possession, with another service on that tenant for the other, and an explanation given, is not good. *Doe, d. Elwood v. Roe, 3 J. B. Moore, 578.*

So service of declaration on the executors of the late tenant is bad, if it do not appear that they are tenants in possession. *Doe, d. Paul v. Hurst, 1 Chit. R.* 162.

The wife may also be served, but then it must be on the premises, or at the dwelling-house of the husband. *Doe, d. Morland v. Bayliss, ubi sup.* *Doe, d. Baddam v. Roe, 2 B. & P.* 55. or *semble* elsewhere, if it be shewn that she lived with her husband, and admitted that she had received the declaration. *Jenny, d. Preston v. Cutts, 1 N. R.* 308. 1 *Chit. R.* 500.

So, though it be not shewn that the husband and wife were living together; but it must be shewn they were living together when the service is not made on the premises nor at the husband's house. *Anon. Id. (n.)*

So judgment signed against the casual ejector, where the service was upon the wife of the tenant in possession, who had left the kingdom, and was settled in a foreign country. *Doe v. Roe, 1 D. & R.* 514.

But C. P. refused to admit the mere acknowledgment of the wife of the tenant in possession that she had received a declaration, to bind the husband. *Goodtitle, d. Read v. Badtitle, 1 B. & P.* 384. 1 *Chit. R.* 121.

Yet it had been previously held, that a service before the essoign day on the daughter, the tenant and his wife being absent, was held good, on the acknowledgment of the wife, though it did not appear that the delivery to her by her daughter was before the essoign day. *Smith, d. Stourton v. Hurst, 1 H. Bl.* 644; *contra* K. B. i. e. in such case it must appear that the defendant also acknowledged that the declaration came to his hands before the essoign day. *Roe, Lessee of Hambrook v. Doe, 14 East, 441.* *Doe, d. Macdougall v. Roe, 4 J. B. Moore, 20.* See the case cited from *Imp. K. B. post.*

But if the tenant purposely keep out of the way, the court will, on affidavit, stating a belief of that fact, and that several endea-

EJECTMENT; III. *Of the Declaration, Notice, Service, &c.*

vours have been used ineffectually to serve him, grant a rule to shew cause why service on the tenant's son, his daughter, or his servants, may not be deemed good service. See 1 *Chit. R.* 101, n.

But service on any of these persons will be deemed good, without such application to the court for a rule *nisi*, provided it afterwards duly appear that the declaration came to the tenant's hands; but if that fact do not appear, service on the servant of the tenant in possession, is bad. *Doe, d. Halsey v. Roe, Id.* 100.

But such application appears to be necessary; for it was held, that service of declaration on the servant of the tenant in possession was insufficient, though affidavit deposed to belief that the tenant kept out of the way to avoid being served. *Doe, d. Jones v. Roe, Id.* 213.

And a subsequent acknowledgment from the attorney of the tenant in possession, that the declaration had been received, is sufficient for judgment *nisi* against the casual ejector. *Doe v. Snee, 2 D. & R.* 5.

So, service upon the agent of the tenant in possession, who resides abroad, is good. *Doe v. Roe, 4 B. & A.* 453.

And before shewing cause against the rule above mentioned, the tenant must swear that the declaration hath not reached his hands, otherwise the rule will be made absolute. *Doe v. Roe, Trin. 30 G. III. Imp. K. B.* 665.

Where a servant refused to call the master to receive the declaration, it may, on motion, be left at the house. *Douglas v. —, 1 Str.* 575. See also *Berrington, d. Dormer v. Parkhurst, Ca. temp. Hardw.* 162. 164. *Quære*, whether such service, under such circumstances, might not now be allowed without previous motion? See *Methold v. Knight, 1 Bl. R.* 290. *Gulliver v. Wagstaff, id.* 317.

It is well observed, that it is needless to recite the various cases in which services, otherwise irregular, have, from peculiar circumstances, been rendered good by rules of court. 2 *Sell.* 96.

The practitioner, keeping in view the reason and grounds of a due and proper service, may, in every anomalous case, be enabled to determine under what circumstances a service will be deemed good; and if he shall be able to make it appear to the court that the best efforts in his power to make were made, duly to serve the tenant in possession, a particular and irregular service may be sanctioned by the court, though there may be no decided case to warrant that particular service; for, from the discretionary powers already exercised in this respect by the courts, parties are encouraged in making any appeal to that discretion which the real difficulties of the case may appear to render necessary.

After these observations, I shall forbear to swell out this title with an enumeration of decisions respecting services on particular facts; they may be found in *Barnes*, page 171; they all establish the truth of the line attempted to be drawn.

It will be expected, however, that in addition to those mentioned above, the more modern and later decisions be stated, and they are now subjoined.

Nailing the declaration on the barn-door of the premises, in which barn the tenant had occasionally slept, there being no dwell-

ing-house, and the tenant not being to be found at his last place of abode, was deemed good service. *Fenn, d. Buckle v. Roe*, 1 *N. R.* 293. and, indeed, whenever the tenant absconds or keeps out of the way to avoid being served, and no one remains on the premises, a copy of the declaration may be affixed on some conspicuous part thereof.

But in ejectment for a stable, service of the declaration by nailing it to the door of the stable, no person being therein, and then going to the defendant's house, and informing him of what had been done, held insufficient to ground a rule that the service be deemed good. *Doe, d. Lovell v. Roe*, 1 *Chit. R.* 505.

So, declaration in ejectment, stuck up in the gateway of the tenant's premises, is not sufficient, unless it be sworn that the tenant kept out of the way. *Anon. Id. n.*

So, in order to ground a rule that service may be deemed good, it is not sufficient to shew that the lessor of the plaintiff had been unsuccessful in two attempts to find the defendant at his dwelling-house, and had therefore stuck the declaration on the premises. *Id. ib.*

So, affidavit of service of declaration when tenant had left the premises, not stating that the lessor, &c. did not know where he was, insufficient. *Id. ib.*

Where no one was in the house, and the declaration was stuck up thereon, the affidavit must state the deponent's belief that the party had absconded with a view to avoid the service. *Doe, d. Lowe v. Roe, Id.*

So, the affidavit, when the tenant has absconded, must state that the copy of the declaration was left as well as affixed on the premises, and that the deponent had used due means to find out such tenant's residence, and verily believes he has absconded. *Doe, d. Farley v. Roe, Id.* 506.

Nor if a tenant in possession leave this country, and reside abroad for the purpose of avoiding his creditors, and the premises be charged with an annuity to the lessor of the plaintiff, to whom a right was reserved to enter, receive the rents, and sell, can judgment be obtained against the casual ejector on an affidavit that the declaration was duly served on the premises, and a copy thereof affixed on the outer door; nor can the service of the declaration on the solicitor of such tenant be deemed good, unless he reside abroad for the express purpose of avoiding such service. *Roe, d. Fenwick v. Doe*, 3 *J. B. Moore*, 576.

But in ejectment, if one part of the premises be vacant, and the other in the occupation of a tenant, it is sufficient for an affidavit to ground a motion for judgment against the casual ejector to state that a copy of a declaration was served on the tenant who occupied the one part, and that another copy was affixed on the door of that part which was vacant. *Doe, d. Evans v. Roe*, 4 *Id.* 469.

Service of the declaration in ejectment on one of two tenants, is good service on both. *Doe, d. Bailey v. Roe*, 1 *B. & P.* 369.

But the service of a declaration on a person appointed by the court of Chancery, to manage an estate for an infant, is not sufficient. *Goodtitle, d. Roberts and Wife v. Badtitle*, 1 *B. & P.* 385; and if the tenant be insane, it is said, that his committee

EJECTMENT; III. *Of the Declaration, Notice, Service, &c.*

Amendment,
where granted.

must be served, but whether the whole of the committee, or one only, does not appear; it certainly will be safer to serve the whole.

That ejectment may be amended is now every day's practice. Even before appearance, amendment was allowed where the name of the tenant in possession was inserted instead of that of the casual ejector. *Doe, d. Cobbey v. Roe*, K. B. T. T. 1816. *Adams*, 198.

So the day of the demise may be amended so as to prevent the right of entry being tolled by fine and non-claim. *Doe, d. Hardman v. Pilkington*, *Burr.* 2447.

So, where brought on forfeiture, where the demise was laid on a day anterior to the time when forfeiture incurred, the day was amended so as to bring it within that time. *Doe, d. Romford v. Miller*, K. B. H. T. 1814. *Adams*, 199. - *Anon.* 1 *Chit. R.* 536. S. P.

So, where the declaration by mistake imported that the term had expired, it was enlarged on payment of costs. *Roe, d. Lee v. Ellis*, 2 *Bl. R.* 940.

So also, where the term had expired before cause could be heard upon an appeal from Ireland. *Vicars v. Haydon*, *Comp.* 841.

So, as to the parish, and this notwithstanding former cases to the contrary. *Doe, d. O'Connell v. Poreb, cor. Heath*, J. T. V. 1814. *Adams*, 201.

So, by inserting a demise by a trustee. 2 *Tidd*, 731.

So, after error, "tenements" allowed to be struck out. *Anon.* 1 *Chit. R.* 536.

Where refused,

The demise cannot be altered to a day subsequent to the delivery of the declaration. *Doe, d. Farlow v. Jefferies*, K. B. T. 1814. *Adams*, 200.

So, where the possession has changed, the term will not be enlarged, although judgment shall have been recovered. *Doe v. Randall and Another*, 1 *Chit. R.* 535.

And amendment by adding a new count on another demise, after three terms had elapsed, and the roll had been made up and carried in, was permitted. *Doe, d. Beaumont v. Armitage*, 1 *D. & R.* 173.

Proceedings
amendable.

There can be no doubt but that the proceedings in ejectments are amendable in every stage at the present day. See *Vicars v. Haydon*, lessee of *Carrol*, 2 *Comp.* 841. and the other references in the margin of the case in *Ld. Raymond*, above cited. See also *Roe, d. Lee v. Ellis*, 2 *Bl. R.* 940. *Williams v. Barclay*, P. R. 16. See also *Doe, d. Bass v. Roe*, 7 *T. R.* 469. But it should seem, that as to the day of the demise, no amendment which shall state the day of the demise to be subsequent to that of the service will be allowed. *Doe, d. Partridge v. Tuckett, cor. Bayley*, J. H. V. 56 G. III.

Where a long period had elapsed after judgment signed, and no delays had been interposed by the defendant in the mean time, the court will not permit the term in the declaration of ejectment to be enlarged for the purpose of the plaintiff's suing out a *scire facias* in order to revive the judgment and take out a writ of possession. *Doe, d. Reynall v. Tuckett and Rendall*, 2 *B. & A.* 773.

IV. OF THE MOTION FOR JUDGMENT AGAINST THE CASUAL
EJECTOR; TRIAL; VERDICT.

The next step to be taken in the prosecution of the legal remedy by ejectment, is to move for judgment against the casual ejector. Motion for judgment against casual ejector.

An affidavit of the due service of the declaration must be made, and if any unusual circumstances have attended the service, they should now be clearly stated. The common form will be found among the FORMS subjoined; and where there are several tenants, only one rule is necessary on a motion for judgment against the casual ejector, though the name of each tenant was separately prefixed to the notice served on him. *Doe, d. Burlton v. Roe*, 7 *T. R.* 477.

An affidavit made by a person who saw the declaration served, and heard it explained to the tenant in possession, is sufficient to entitle the plaintiff to judgment against the casual ejector. *Goodtitle, d. Wanklen v. Badtittle*, 2 *B. & P.* 120. but it must be positive that the tenant is tenant in possession; for information on belief will not do in this case. *Barnard*, 330. 429. And see 1 *Chit. R.* 215.

When the declaration is served on the party, it must appear by the affidavit of service that he is tenant in possession of the premises, an affidavit of service on the person in possession, or upon a person whom the deponent believes to be tenant in possession being insufficient. *Doe, d. Robinson v. Roe*, *T.* 35 *G.* 111. *K. B.* 1 *Tidd*, 505; but the court will give leave to file a supplemental affidavit. *Id.* 507.

Service of declaration on person whom deponent believes to be tenant in possession, bad, if notice be not addressed to such person. *Doe v. Badtittle*, 1 *Chit. R.* 215.

Service of declaration on one of four tenants, is bad, unless the affidavit shews they are all in possession. *Doe d. Bromley v. Roe*, *Id.* 141.

Where it was sworn that the declaration was served on A. B. the tenant in possession, or on C. his wife, not being certain as to either, it was held bad. *Birkbeck v. Hughes*, *Bar.* 173; and for the same reason it was held bad where it was sworn that the service was on the wives of A. and B. who, or one, were tenants. *Harding v. Greensmith, d. Baker*, *Id.* 174.

Affidavit for judgment against the casual ejector, is sufficient if it impliedly shews that the tenant is in possession at the time the declaration was served on his wife. *Anon.* 1 *Chit. R.* 500. n.

Affidavit of service of an ejectment on the wife of the tenant who lived on the premises, insufficient, unless it state that the wife lived with the husband, or that the service was made on the premises, or at the husband's house. *Goodtitle, d. — v. Badtittle*, *Id.* 499.

But service of the declaration in ejectment upon the wife of the tenant in possession, without stating that it was served at the husband's house, or on the premises, insufficient to support a rule for judgment against the casual ejector. *Right v. Wrong*, 2 *D. & R.* 84.

EJECTMENT; IV. *Motion for Judgment, &c. Trial, Verdict.*

So, service of declaration in ejectment on a woman "representing" herself to be wife, without stating deponent's belief that she was so, insufficient. *Doe, d. Simmons v. Roe*, 1 *Chit. R.* 228.

So, affidavit of service on the son of the tenant in possession, and that such tenant acknowledged that he had received the same, is not sufficient, as it must state that such acknowledgment was made before the *essoign* day. *Doe, d. Macdougall v. Roe*, 4 *J. B. Moore*, 20.

But service of declaration in ejectment by leaving it with the daughter of the tenant in possession (who was confined by indisposition) with an affidavit that the daughter acknowledged the receipt of the declaration, and that she had read it over and explained it to her mother before the *essoign* day of the term, sufficient for a rule *nisi* for judgment against the casual ejector. *Doe v. Roe*, 2 *D. & R.* 12.

If the court be not satisfied that the service were, under the circumstances stated in the affidavit, sufficient, a rule is granted to shew cause why, under such circumstances, it should not be good; and the court further directs, that service of the rule on the premises shall be good service; otherwise the rule for judgment against the casual ejector is absolute in the first instance.

It is said, 2 *Sell.* 99, that if the affidavit of service be defective, and the defects can be cured, a supplemental affidavit may be made, which, being taken to the clerk of the rules, he will attend the judge and obtain an order to draw up rule. To this point of allowing a supplemental affidavit to be filed, Mr. Tidd cites *Doe, d. Robinson v. Roe*, 35 *G. III.* 490, 5th edit.

The next and following steps will depend upon whether an appearance and plea be filed or not. To ascertain this fact, the ejectment books kept at the judge's chambers must be searched, but what is now to be done falls to be mentioned under ss. IX. XIV. PRACTICAL DIRECTIONS, which therefore see.

The proceedings now, on account of the fictitious peculiarities of the action, become somewhat complex; but it will simplify the view of the practice if the different stages of the proceedings, varied by the different circumstances in which the lessor of the plaintiff, and the defendant may be placed, be distinctly mentioned; and without interrupting, therefore, a statement of the course of proceeding on the part of the plaintiff or his lessor, by describing in this place what should be done on the part of the defendant or tenant in possession, I shall previously state the course of practice, as it appears from the cases, to be pursued on the part of the plaintiff to the termination of the suit.

If the defendant appear and plead, as to which, therefore, see *post*, the issue is made up as in other cases. See PRACTICAL DIRECTIONS on the part of the lessor of the plaintiff, *post*.

In making up the issue, observe, it must agree with the declaration first delivered, except in the name of the defendant, unless an order be obtained for that purpose. *Bass v. Bradford*, 2 *Ld. Raym.* 1411; and it appears by the same case that the defendant may obtain a rule that the issue should be made, according to the declaration delivered against the casual ejector.

Search for appearance and plea.

Observations as to subsequent steps.

As to issue.

If after issue, and before trial, the plaintiff enter into part of the premises, the defendant at the assizes may plead that fact as a plea *puis darrein continuance*. *Moore v. Hawkins, Yelv. 180.* And the judge is bound to receive such plea, provided it be verified by affidavit. It is made part of the record, and the trial is stopped, for the plaintiff cannot reply to it at the assizes. *Paris v. Salkeld, 2 Wils. 137. 139. Lovell v. Eastoff, 3 T. R. 554.*

As to plea of *puis darrein continuance*.

The death of the lessor of the plaintiff does not seem to be abatement. *Wilkes v. Jordan, Hob. 5.*

Death of lessor, not abatement.

But if the plaintiff, that is to say, the nominal plaintiff, or if there be a real one, such plaintiff in that case go on, as he may, though the lessor were only tenant for life, for damages and costs, the court will compel him to give security for costs in case judgment go against him. *Thrustout, d. Turner v. Gray, 2 Str. 1056.* Should, however, the plaintiff in this case be nonsuited for want of defendant's appearing and confessing, the executor of lessor shall have no costs taxed on the common rule. *Thrustout v. Bedwell, 2 Wils. 7.*

But the plaintiff proceeding must give security for costs.

Ejectment against two; one died after issue joined, but before trial; the death must be suggested on the roll; the judgment needs not say, *quod quarens nil capiat per billam* against the dead defendant; and the judgment is not to be for a moiety only, but that he recover his term. *Far v. Denn, 1 Burr. 362;* and a *venire* should be awarded to try the issues between the survivors, *Ibid.* And where the *venire* was awarded against both, and the verdict was against both, yet, upon suggesting the death of the one upon the roll, after verdict, the plaintiff had judgment for the whole against the other. *Per curiam* in *Gree v. Rolle and Newell, 1 Ld. Raym. 716;* but the cases stated to have been cited do not appear.

Where suggestion of death necessary.

In common actions the defendant may allow the plaintiff to proceed to trial, obtain a verdict, and sign final judgment, although such defendant shall have taken no step in the cause after plea by him pleaded; yet he will be enabled to bring error, or to move in arrest of judgment on any important defect in the record; but the frame of the legal remedy by ejectment will not permit this to be done; the defendant, if he plead, must also appear on the trial, and afterwards proceed to set aside the verdict on account of variance between the issue and record; for, if he do not appear, and suffer plaintiff to be nonsuited for want of his confessing, he is out of court, and cannot properly afterwards move to set aside the nonsuit, or stay the proceedings; though upon such motion, the court did, on payment of costs, grant the rule. *Jones, d. Thomas v. Hengest, Bar. 175. Law v. Wallis, Id. 156.*

As to appearance of defendant on trial.

In order to explain the difficulty as to in what way it is, that the nonsuit of the plaintiff, by reason of lease, entry, and *ouster*, not being confessed on the trial, by the appearance of the defendant, shall tend to the advantage of the lessor of the plaintiff, the peculiar construction of the action must be re-collected. The nominal plaintiff commences an action of trespass against a person for an injury done respecting property demised to him by another called his lessor, or the lessor of the plaintiff; the defendant who appears upon the face of the declaration served, has no being; but a real defendant, either tenant or owner who may

Why nonsuit of the plaintiff on certain grounds tends to the benefit of his lessor, explained.

EJECTMENT; IV. *Motion for Judgment, &c. Trial, Verdict.*

he both takes his place; but before he can do so, the court imposes upon him certain terms, viz. to confess *inter alia*, the trespass, &c. On this undertaking, or on this submission to perform these terms, the plaintiff goes on to trial; but if the substituted or real defendant do not appear, and acknowledge *inter alia*, the committing the wrong, the plaintiff is stopped in *limine*; the gist of his action is gone, and on such trial he must be nonsuited, yet by the real defendant's not appearing, the matter stands as it did originally, namely, between the plaintiff and the former, or first defendant, or, as he is called, the casual ejector; against him, therefore, for not appearing, the judgment, differing in the different counts, may in due time be signed by the plaintiff. The judgment being signed against the casual ejector, would only warrant execution issuing against him, or his possession; but, as he is a non entity, the justice of the case would be unreached. In order to account for this apparent anomaly, the terms of the notice at the foot of the declaration served on the tenant in possession must also be recollected.

When, therefore, this is the case, namely, that the substituted or real defendant do not appear on the trial, and the plaintiff is, therefore, in course, nonsuited: it is at the trial especially recorded, that he is so nonsuited, by reason of such non-appearance of the real defendant, and the consequent non-confession of the very gist of the action, lease, entry, and ouster.

The *postea* states the grounds of the nonsuit.

The *postea* then states this fact, and the consequence of the substituted or real defendant's not appearing conformably with the terms of the rule, is, his being fixed with the costs, which he must pay, or be attached; and the person in possession, whoever he may be, having also failed to appear, or any one for him in pursuance of the notice subjoined to the declaration, is turned out of possession.

When final judgment signed against casual ejector.

But where nonsuited on this ground, the plaintiff in ejectment is not entitled to sign judgment against the casual ejector, till the *postea* comes in on the day in bank. *Doe, d. Lord Palmerston v. Copeland*, 2 *T. R.* 779. The practice is different in the C. P. See *post*.

Where otherwise, verdict given on the merits, or the plaintiff nonsuited. Where landlord's title not impeached.

If the proper parties duly appear at the trial, the verdict is given for the plaintiff, or the defendant, on the merits; or the plaintiff may be nonsuited for other causes than those above mentioned.

An attempt was made to impeach a landlord's title, by proving from one of his own witnesses, the existence of an agreement relative to the lands in question; but as such witness was ignorant of the contents of such agreement, and no notice had been given to produce it, the attempt was not allowed to succeed. *Doe, d. Sir Mark Wood v. Morris*, 12 *East*, 237.

What plaintiff or lessor must prove on trial.

It is a rule that whatsoever bars the right of entry, is a bar to the plaintiff's title; therefore, the plaintiff must on trial prove seisin within twenty years in himself, or his ancestors, or must prove a seisin in the person that has a particular estate in the land, and that he claimed within twenty years after the reversion accrued; or that he was an infant; *non compos*; imprisoned beyond the sea; or if a woman, under coverture at the time when the title accrued; and that he claimed within twenty years after he came of age, &c. for every plaintiff in ejectment

must shew a right of possession, as well as of property, and, therefore, the defendant need not plead the statute of limitations, as in other actions. *Bac. Abr. tit. Ejectment.*

Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the statute 4 H. VII. c. 24, it is not necessary for the lessor to prove an actual entry to avoid such fine, considering it only to operate as a fine at common law; but by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue. *Doe, d. Duckett and Another v. Watts, 9 East, 17.*

And in ejectment against lessee of tithes for holding over after the expiration of a notice to quit, some evidence must be given to shew that he did not mean to quit the possession, as by his declaration to that effect, or even his silence when questioned about it; or as it seems by shewing that the defendant, who claimed by assignment from the original lessee, had entered into the rule to defend as landlord. *Doe, d. Brierly v. Palmer, bart., 16 East, 53.*

The plaintiff in ejectment having proved that he was entitled to recover part of the premises, the question of the precise extent of his claim, as defined by particular metes and boundaries, cannot be inquired into. *Doe, d. Drapers' Company v. Wilson, 2 Stark. 477.*

The defendant in ejectment is entitled to the general reply, where the plaintiff, claiming by descent, proves his pedigree, and stops, and the defendant sets up a new case in his defence, which is answered by evidence, on the part of the plaintiff. *Goodtitle, d. Revett v. Braham, (trial at bar) 4 T. R. 497.*

Where defendant entitled to general reply.

A new trial may be had in ejectment, as well as in other cases. *Goodtitle, d. Alexander v. Clayton, 4 Burr. 2224.*

New trial granted.

If the verdict be for the plaintiff, the costs are taxed; but the court will not refer it to the prothonotary to take an account of monies received by the lessor of the plaintiff in respect of annuities, or to ascertain the costs in an action of ejectment. *Doe, d. Johnson v. Roe, 6 J. B. Moore, 331.*

What done on verdict for plaintiff.

The final judgment or such verdict is signed, writ of execution is issued for the costs, and a writ of possession for the premises; or this last writ and a writ of *feri facias* may be incorporated. See PRACTICAL DIRECTIONS, also FORMS subjoined.

V. OF THE PROCEEDINGS AFTER VERDICT.

It may be useful to add a note as to the judgment in ejectment, and to subjoin some of the cases relating thereto.

As to the judgment.

By the practice of K. B. the plaintiff in ejectment is not entitled to sign judgment against the casual ejector until after the *postea* is brought in on the day in bank. But where after verdict by default of defendant the plaintiff sued out a writ of possession on the 6th of November, without producing the *postea*, and executed it on the 12th, without any objection on the part of the defendant until afterwards, the court refused to set aside the writ; it appearing that the defendant had sustained no prejudice: and the court added, that if he had, that was matter of reference to the master. *Davis v. Williams, 2 D. & R. 229.*

It will be seen, FORMS subjoined, that on a single demise, the form of the judgment is, "that the plaintiff do recover his term

On a single demise.

EJECTMENT; V. Of Proceedings after Verdict; CASES.

aforesaid yet to come and unexpired of and in the said tenements, with the appurtenances above mentioned, whereof it has been found by the jurors aforesaid, that the defendant is guilty of the trespass and ejectment aforesaid, and his damages aforesaid, by the jurors aforesaid, in form aforesaid assessed, and also," &c. and the language of Lord Mansfield, C. J. in delivering the opinion of the court in Taylor, *d. Atkins v. Horde*, 1 Burr. 60-114, will form a good comment thereon.

Lord Mansfield,
C. J. on a judgment in ejectment.

"In truth, and in substance, a judgment in ejectment is a recovery of the possession, not of the seisin or freehold, without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it in truth and substance, can only be possessed according to right *prout lex postulat*.

"If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a termor, and in respect of the freehold, his possession eures according to right. If he has no title, he is in as a trespasser; and without a re-entry by the true owner, is liable to account for the profits."

And upon the principle delivered above, though not upon the authority or case, for the question did not there arise, it had before been decided in Ablett, lessee of Glenham *v. Skinner*, 1 Sid. 229; that the lessor shall recover according to his title; for where the declaration was of a fourth part of a fifth part, and the lessor's true title was only to one-third of one-fourth of a fifth part, which was only a third part of what was demanded; yet it was resolved, that the verdict should be taken according to the title.

And in a subsequent case, the question was, whether the plaintiff, on her declaration for a moiety of the lands, tenements, and hereditaments therein mentioned, could recover one-third part of such premises; and Mansfield, Ld. C. J. declared the rule to be as stated above, and that in the present case she had demanded half, and that she appeared entitled to a third, and that so much she ought to recover, and his Lordship, and Foster, J. both declared the above case from Sid. to be in point, Denn, *d. Burgess v. Purvis*, 1 Burr. 326, the case of Goodwin *v. Blackman*, 3 Lev. 394, 395, was said to be a strange case, and contrary to all experience.

Where leave to
issue execution
necessary.

When the landlord is admitted to defend an action of ejectment, and judgment is entered against the casual ejector with stay of execution until farther order, the lessor before he takes out execution must move the court for leave to do so, and the rule is not absolute in the first instance. Doe *v. Gibbs and Wife*, 1 Chit. R. 47. &c. Doe, *d. Simons v. Masters*, S. P. Id. 239. In the application of this case it will be considered how far the stat. 1 G. IV. c. 87. has rendered it nugatory.

Aliter where there is a verdict against the landlord in ejectment on his appearing at the trial and confessing lease, entry, and ouster, for there judgment may be entered up thereon and execution issued against him without applying to the court. *Per Cur. H. 56 G. III. K. B. 2 Tidd*, 1012.

Where plaintiff
may distrain for
rent after verdict.

The landlord of premises after notice to quit brought an action of ejectment against the tenant and obtained a verdict. The latter still containing in possession, the landlord afterwards distrained on him for rent which became due after the verdict and which he

paid: Held that the execution in the ejectment could not be stayed, as the tenant should have disputed the distress. *Doe, d. Holmes v. Davis*, 2 *J. B. Moore*, 581.

Writ of possession cannot issue at the distance of 20 years, after judgment, without a *sci. fa.* to be obtained on motion. *Doe v. Rendall and Another*, 1 *Chit. R.* 535. Where before execution *sci. fa.* necessary.

Of course execution can be taken out for no more than the plaintiff's right to recover, *Far v. Denn*, 1 *Burr.* 362; and this right will be modified by circumstances; for, where the declaration was served on a tenant, and his landlord was admitted to defend, the plaintiff was held capable of recovering only such premises as the tenant was proved to be in possession of. *Fenn, d. Blanchard v. Wood*, 1 *B. & P.* 573. Execution, for what.

And after verdict in ejectment for a messuage and tenement, the judgment may be entered according to the judge's notes for the messuage only, and this pending a rule to arrest the judgment, without obliging the lessor of the plaintiff to release the damages. *Goodtitle, d. Wright v. Otway*, 8 *East*, 357.

Ejectment against a feme sole who married before trial, and verdict and judgment against her by her original name: Held that it was regular to issue an *habere facias possessionem* and *fi. fa.* against her by the same name, though the *fi. fa.* was inoperative. *Doe, d. Taggart v. Butcher*, 3 *M. & S.* 557. Ejectment against a feme sole.

If an ejectment be brought against baron and feme, and the plaintiff hath a verdict against both, and before judgment the husband dies, the plaintiff may, on suggestion of this fact, have judgment against the wife, and the reasoning adopted in this case by Mr. Crompton, seems founded in principle, "not only because this is a trespass committed by the wife, and that therefore she is punishable for her own act, which is injurious to another, but, because where the wife is found guilty of the ejectment, she must have obtained that unlawful possession either jointly with her husband, and then it survives, or else she had the whole possession in her own right, and in either case, the plaintiff may punish her, and recover the possession, which is wholly in her on the death of her husband." *Roll. Rep.* 14. See also *Rigley v. Lee and Wife*, *Cro. Jac.* 356. Judgment where husband dies.

In the marginal note of the case of *Morres, bart., v. Barry*, 2 *Str.* 1180, it is said, that the court will make any possible intendment to support a judgment in ejectment; and the case was, where there are two demises laid on the same premises for the same term, both as to commencement and duration, and the judgment was, that the plaintiff recover his terms in the plural number in the premises; it was objected, that both lessors could not have a title to demise the whole, and therefore there was an inconsistency in the judgment, and *non constat*, which of the lessor's rights is established; the court, however, ruled, that as this (*objection*) was after verdict, a bare possibility of title, consistent with the judgment, will be sufficient. The judgment does not entitle the plaintiff to hold one moment longer than he ought to do, if it had been termed in the singular number. But see *Roe v. Power*, *Dom. Proc.* 2 *N. R.* 1. Where a declaration contained two demises by

Courts disposed to support the judgment.

EJECTMENT; VI. *As to the Defence; Appearance.*

two different lessors of two distinct undivided thirds : judgment was given, that the plaintiff "do recover his said terms." On error it appeared from the facts stated on a bill of exceptions to the judge's directions on a point of law, that the ejectment respected only one undivided third, held well enough on this record, where the point was only raised by bill of exceptions. *Semble*, however that it would have been well, even on special verdict.

The court refused to set aside the verdict in ejectment, on the ground that there was a variance between the description of the premises in the *Nisi Prius* record, [upon which the plaintiff recovered], and the issue, it not being stated how the premises were described in the declaration delivered. *Doe, d. Cotterill v. Wyde*, 2 B. & A. 472.

For further, as to execution in ejectment, see title *HABERE FACIAS POSSESSIONEM*, Writ of *Habere facias possessionem*.

VI. AS TO THE DEFENCE. APPEARANCE.

As to the defence.

The cases hitherto mentioned relate to the prosecution of the action in ejectment on the part of the plaintiff, or of his lessor therein; it remains to mention some of those which relate to the defence; whether that defence be made by the original tenant, his landlord, or by any other person claiming title also to the premises in question.

And it may be in place here to observe, that the tenant may shew his landlord's title at an end in ejectment brought against him by the landlord. *Doe, d. Jackson v. Ramsbotham*, 3 M. & S. 516.

Appearance to be duly entered.
Tenant to give his landlord notice of ejectment by stat.

The first step to be taken on the part of the tenant, on being properly served with the declaration in ejectment, and if he mean to dispute the possession is duly to appear; or if his holding be under landlord, he must forthwith, agreeably to the statute to be immediately mentioned, give him due notice thereof, and this he usually does, by transmitting to him, or to his steward or agent, the declaration with which he has been served.

The stat. 11 G. II. c. 19. s. 12.

As well to prevent fraudulent recoveries of the possession by collusion with the tenant, and also probably to punish the carelessness of tenants, in a matter of so much importance, should they neglect to give due notice of a declaration in ejectment being served to the person under whom they hold, or whose title may be impeached, or whatever else might be the motives that actuated the legislature, by stat. 11 G. II. c. 19. s. 12. that every tenant to whom any declaration in ejectment shall be delivered for any lands, tenements, or hereditaments, shall forthwith give notice to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years improved or rack-rent of the premises so demised, or holden in the possession of such tenant, to the person of whom he holds, to be recovered by action of debt, &c.

Sect. 13.

By s. 13, the court, where such ejectment shall be brought, may suffer the landlord to make himself defendant, by joining with the tenant to whom such declaration in ejectment shall be delivered, in case he shall appear; but in case such tenant shall refuse or neglect to appear, judgment shall be signed against such casual ejector for want of such appearance; but if the landlord of any part of the

lands, &c. for which such ejectment was brought, shall desire to appear by himself, and consent to enter into the like rule, that by the course of the court the tenant in possession, in case he or she had appeared, ought to have done, then the court, where such ejectment shall be brought, shall permit such landlord so to do, and order a stay of execution upon such judgment against the casual ejector, until they shall make further order thereon.

The court will not, after a plaintiff has obtained judgment and possession in an undefended ejectment, without collusion, and has sold part of the premises, and transferred the possession, let in a landlord, to defend from whom his tenants had concealed the ejectment. *Goodtitle v. Badtitle*, 4 *Taunt.* 820.

A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of this statute. *Buckley v. Buckley*, 1 *T. R.* 647. But as such ejectment can no longer be brought for such a purpose, *quare* the practical pertinency of this case.

Who not liable to the penalties of the act for not giving notice.

It is said, that under this act no person claiming title will be let in to defend, but he that can first seal a lease upon the premises must obtain possession. *Bull. N. P.* 95. *Ex parte Beauchamp and Burt*, *Bar.* 177; and, therefore, a mortgagee, who was not in possession, and had never received the rents, was refused to be admitted a defendant with the tenant, *Jones, d. Woodward v. Williams*, *T.* 15 *G. II.* 2 *Crompt.* 173; but this limited construction of the act seems to be doubtful as to this case; see *Runn. Eject.* 2d edit. 208; the lord by escheat has a right by law to be joined with the tenant. *Fairclaim ex dimiss. Fowler v. Shamtitle*, 3 *Burr.* 1290. 1304.

Who may be let in to defend.

In the course of the argument on this case, Wilmot, J. observed, that two different acts of parliament had been made at near 500 years distance upon the very same subject, where there was no occasion for either (the stat. Westminster 2. c. 3, and this act of 11 *G. II.* c. 19). This observation, it will be seen, related to the question, whether a landlord, or he that stood behind the tenant in possession, had, or had not, a right to come in and be received *pro interesse suo* [for his own interest in the premises], or to be made co-defendant with the tenant. *Vide* 2 *Inst.* 344, 345, and *Bracton*, lib. 5. fo. 393. b. No. 14. *ibid.* 190, 1. And it has been decided, that a devisee, not in possession, may be admitted to defend instead of the tenant. *Lovelock, d. Norris v. Doncaster*, 4 *T. R.* 122; but a *cestui que trust* cannot. *Same, d. Same v. Same*, 3 *T. R.* 783.

This statute said to be unnecessary.

But the court will not set aside a judgment and execution in ejectment, in order to let in a person to defend, though he make an affidavit setting forth a clear title, and offer to pay costs. *Doe, d. Leger v. Roe*, 3 *Taunt.* 506.

And a third person cannot defend as landlord upon the trial of an ejectment, where it appears that the tenant in possession came in as tenant to lessor of the plaintiff and paid rent to him under an agreement that has expired. *Doe, d. Knight v. Lady Smythe*, 4 *M. & S.* 347.

It has been decided, that although the rule made upon the motion for judgment against the casual ejector, is in the following words:

As to appearance.

EJECTMENT; VI. *As to Defence; Appearance; Cases.*

"that if the tenant in possession shall not appear within four days after the end of the term, judgment may be signed against the casual ejector;" judgment ought not, according to the usual practice of the court, to be signed before the afternoon of the fifth day after the end of the term. *Hyde, d. Culliford v. Thrustout, Say. R. 303.*

R. G. E. 2 G. IV. C. P.

In all country ejectments which shall be served before the es- soign day either of Michaelmas or Easter term, the time for the appearance of the tenant in possession must be within four days after the end of such Michaelmas or Easter term, and must not be postponed until the fourth day after the end of Hilary or Trinity term next respectively following. *R. G. E. 2 G. IV. C. P. 5 J. B. Moore, 637.*

Of what term appearance entered.

The appearance in ejectment should be entered of the term mentioned in the notice; and where the notice to appear was in Hilary, and the tenant entered an appearance in Michaelmas following, and did nothing farther, and plaintiff finding no appearance of Hilary, and no common rule entered into or pleaded, signed judgment against the casual ejector, the court held it regular; but afterwards set it aside, upon payment of costs to try the merits. *Mason, d. Kendale v. Hodson, Bar. 250.*

Other cases as to appearance and defence.

Mr. Crompton has collected several other cases in relation to appearance and defence, by persons claiming to be admitted to defend, as tenants, as landlords, or as otherwise, setting up a title to the premises.

If one tenant in common bring ejectment against another, there is no occasion to prove an actual entry and ouster, for that is confessed by the rule; but if the fact be, that there has been no actual ouster, the defendant ought to apply to the court not to compel him to confess, or to permit him to do it specially, which the court will grant where it is only matter of account, and the only ouster is by perjury of the profits, without an actual obstruction of the other to occupy. *Wigfall v. Bridon, E. 6 G. III. cited 2 Crompt. 178.* So, that in such case, the defendant should only confess lease and entry, for one tenant in common has no right to oust another.

In C. B. it was moved, that the landlords, viz. A. B. and C. might be made defendants, without the tenants in possession, who refused to appear; but the motion was denied, and the common rule was made to add the landlords to the tenants in possession. *Barnes, 172.* See, however, *post*, where *Barnes, 179*, is cited.

Motion that Mr. P. who claimed title, might be made defendant instead of the late tenant who quitted possession, denied. *Barnes, 175.*

In ejectment, the court denied to let the parson of Hampstead chapel defend only for a right to enter and perform divine service, notwithstanding the case in *Salk. 256*, (*Hillingsworth v. Brewster*) saying, it had often been denied since *Martin v. Davis, Stra. 914*; but it is said otherwise, and these cases are cited, *1 Sell. 107.*

Motion on affidavit, that the tenant in possession was a material witness for the landlord, that, therefore, the landlord might be made a defendant in the room of the tenant in possession rejected; that it was never done, and it would not make him a witness when

done. And, *per Cur.* he is liable for the mesne profit. The declaration is regularly delivered to the tenant in possession. It was never done in this court. *Bourne v. Turner, Stra. 632.*

A motion was made on behalf of the tenant in possession against D. an attorney for appearing and pleading for him without authority: it appeared, that the tenant in possession was tenant at will, to infants, by order of whose guardian, D. had appeared, and pleaded for the tenant, and offered the tenant security to indemnify him; but, *per Cur.* a defence cannot be made for the tenant without his consent; let the appearance and plea be withdrawn. *Barnes, 39.*

In C. B. the agents for the tenant in possession entered their appearance with the filazer, and sent a note to plaintiff's agent, that defendants pleaded not guilty; plaintiff's agent signed judgment for want of a plea in form. The counsel for the tenants submitted to the court, that according to the words of the rule for judgment against the casual ejector, unless the tenants appear, a new declaration against the tenants should, in strictness, have been delivered before a plea in form could be required. Judgment set aside with costs. *Id. 270.*

On motion for the landlord to defend upon the statute 11 G. II. the court objected, that this motion could not properly be made till after judgment signed against the casual ejector, and that an affidavit ought to be produced of the tenant's refusal or neglect to appear; to which it was answered, that after judgment signed against the casual ejector the plaintiff might take possession; but the court held the affidavit to be necessary, and made no rule, declaring that the intent of signing the judgment against the casual ejector, was only that the plaintiff, after having tried his cause against the landlord (the tenant not being a party) might have the benefit of his verdict, and take possession under the judgment, which, under such verdict, he could not. It seems reasonable (upon a proper affidavit) to grant a rule to shew cause, before judgment against the casual ejector can be signed, to prevent the ill consequences of taking possession immediately after. *Id. 179.*

The tenants had the forenoon of the 29th of April in Easter term to appear in; F. the landlord, moved to add himself to the tenants, but no appearance being entered, plaintiff, on the 30th, signed judgment against the casual ejector; the landlord afterwards, without disclosing to the court what had been previously done, applied for the conditional rule as a matter of course, and, by virtue thereof, on the 1st of May, appeared alone without the tenants; plaintiff moved to take out execution on the judgment, and on shewing cause, the judgment appeared to be regular, and the appearance out of time; plaintiff offered to waive his judgment, if the landlord, who resided at Jamaica, would give security for costs, to which his counsel not consenting, the court made the rule absolute, for leave to take out execution. *Id. 186.*

It was moved on this statute, that the landlord might be added defendant to C. D. one of his tenants, who appeared to defend the premises in his possession, and that as to the residue of the premises contained in the declaration in the possession of T. M. another tenant, who refused to appear (as *per* affidavit), the land-

EJECTMENT; VI. *As to Defence; Appearance; Cases.*

lord might appear and defend singly : ruled accordingly ; and that the plaintiff might sign judgment against the casual ejector as to the tenements in possession of *T. M.*, but that the writ of *hab. fac. poss.* be stayed till further order. *Barnes*, 179.

A regular judgment had been fairly obtained against the casual ejector, the tenant having neglected to give notice to the landlord, for which reason the landlord moved to set aside the judgment ; the landlord was an infant, and therefore could not consent to any issue ; the court held that the possession ought not to be changed, where there had been no trial, nor opportunity of trying, and ordered that the tenant should pay the costs, that the regular judgment and writ of possession should be set aside, that the landlord be made defendant, and not to set up any satisfied term, or trust estate, and to admit that *Z. T.* was seised. *Burr. Rep.* 4. pt. 1996. (*Troughton v. Roe*, 4 *Burr.* 1996.)

Where the landlord is made defendant, the plaintiff must prove the landlord tenant, in possession of the premises in question. 1 *Wils.* 220. But see *R. M.* stat. 1 *G. IV. ante.*

A landlord was made defendant according to the 11 *G. II. c.* 19. s. 13, on the tenant's non-appearance, and entering into the common rule, and thereupon a stay of execution was ordered until the court should make further order. *Burr. Rep.* 4. pt. 757. (4 *Burr.* 757.)

If a writ of error is brought by a landlord, it is sufficient reason against taking out execution. *Ibid.*

But the proper opportunity for the landlord to make his stand against the execution is, by shewing this as cause against the plaintiff's motion for leave to take it out. *Ibid.* And if he omits this opportunity, the execution regularly issued, shall not be set aside. *Ibid.*

A landlord made defendant without his tenant may bring error, and stay execution. *Stra.* 1241.

The landlord had applied to be made a defendant, and had entered into the common rule, but the lessor of plaintiff had not joined in the consent rule, and, on motion to set aside a rule to reply (as he could not be forced to proceed against a person whom he had never accepted as defendant), the court held the rule to be regular, and that the nominal plaintiff might be non-pressed thereby, but being nominal, the defendant could have no costs. 2 *Bl. Rep.* 763. In *C. B.* the plea of Marshall and others, landladies and tenants in possession, who had appeared with the filazer, and entered into the common rule, was left in the prothonotary's office, entitled with the true name of the cause, but, by mistake in the body of the plea the name of the plaintiff, lessor was inserted (as the person complaining), instead of that of the nominal plaintiff. Plaintiff's attorney looking upon this plea as null and void, signed judgment against the casual ejector, which judgment was set aside with costs, as irregular, the plea is properly entitled, and not a nullity. *Bar.* 191.

In *C. P.* the declaration was delivered to the tenant in possession, without any prothonotary's name set thereon ; upon affidavit of service, the court made a rule for the tenant to shew cause why, upon notice at the prothonotary's office, judgment should not be

entered against the casual ejector, unless he (the tenant), appeared within the usual time, which rule, on affidavit of service, was made absolute. *Bar.* 192.

Motion was made to make the lessor of the plaintiff's wife, a defendant in ejectment, the plaintiff's title being, by a pretended intermarriage, which was controverted, *Et per Holt, C. J.* To make a landlord a defendant in ejectment is of right, for otherwise he might lose his possession by combination between the plaintiff and tenant in possession, and the court inclined to grant the motion, because there could be no inconvenience, and it would make the verdict more considerable; but, in regard the wife lived in Cheshire, and must have fourteen days notice of the trial, and the defendant would not waive that; the court perceived it a trick to put off the trial, so nothing was done. 1 *Sulk.* 157.

The court will not endure a lessee to defend (alone) an ejectment against his landlord, or those claiming under him, on a supposed defect of title. 2 *Bl. Rep.* 1259.

Having pointed out the obligation of the tenant to give his landlord notice of the being served with the ejectment according to the act of parliament; also as to who may, and who may not be admitted to defend, in the place of, or with the tenant in possession, it becomes necessary next to notice some of the cases that have been decided on the consent rule; but previously it may be in place to mention that if the plaintiff declare generally, and the defendant doubt what lands the plaintiff means to proceed for, he may call upon him by a judge's order to specify them; and, on the other hand, the plaintiff may call on the defendant to specify for what he defends, when that is not ascertained by the consent rule. *Goodright, d. Balch v. Rich*, 7 *T. R.* 327, and n. 332, seq.

Cases on the consent rule.

Where particulars of premises claimed or defended may be had.

So, where the ejectment is brought for forfeiture of a lease, the court will compel the plaintiff to deliver a particular of the breaches of covenant on which he intends to rely. *Doe, d. Birch v. Philips*, 6 *T. R.* 597. And it should seem that such particular must not be too general; the breach meant to be proved must be specified. See 3 *Ves. & B.* 30.

Where a defendant in ejectment shews by affidavit that he is coparcener, joint tenant, or tenant in common, and denies actual ouster, the court will permit him to confess lease and entry only, without confessing ouster. *Doe, d. Gigner v. Roe*, 3 *Taunt.* 397.

The nature of the consent rule has been shewn above; also how far it has been modified by a late rule of court*: and its operation is decided to be sufficient to prevent a nonsuit for want of proof of actual ouster; but in the case of *Goodright, lessee of Hare v. Cater*, where this effect of the consent rule was acknowledged, it was also said, that actual entry is only necessary to avoid a fine: and where ejectment was brought after a fine levied by the defendant, but before all the proclamations have been

Notwithstanding consent rule, where entry must be proved.

* Whether the observations made in the former edition of this compilation upon some of the terms of the consent rule, had met the eye of those in authority, the editor will not venture to determine; but he with pleasure finds

that when making those observations, he anticipated the signal improvement in the practice wrought by *K. M. 1 G. IV.* 1820, long before that important rule was promulged.

EJECTMENT; VI. *As to Defence; Appearance; CASES.*

made under the stat. 4 H. VII. c. 24, it is not necessary for the lessor to prove an actual entry to avoid such fine; considering it to operate only as a fine at common law, but, by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue. *Doe, d. Duckett v. Watts*, 9 *East*, 17.

To the exception above-mentioned, although said to be the only one, it seems that others may be added. In order to enable a person who has recovered in ejectment to maintain trespass for the mesne profits against one who was occupier when the title accrued, but not at the time of the ejectment, actual entry is necessary. *Law of N. P.* ed. 1775, p. 87, cited 2 *Doug.* 485, n. In the same note a question is made as to whether an actual entry is not also necessary in order to prevent the operation of the statute of limitations, *vide Law of N. P.* ed. 1775, p. 102. So held on a trial at bar in *Ford v. Gray*, B. R. H. 2 *Anne*, unless there be some special reason to the contrary. 1 *Salk.* 285.

It appears that a new defendant, giving a rule to reply, may non pros the plaintiff in ejectment, but being nominal, the defendant can have no costs. *Goodright, d. Ward v. Badtittle*, 2 *Bl. Rep.* 763.

Fine and non-claim, or a descent cast, which takes away the entry, are good pleas in this action in bar of the plaintiff's right of entry.

A record is a good plea in ejectment, *Petoe's Case*, 9 *Co.* 77; as is also ancient demesne, because it tastes of the realty, *Abden's Case*, 5 *Co.* 105; but this cannot be pleaded without leave of the court and affidavit, *Doe, d. Rust v. Roe*, 2 *Burr.* 1046; but see *Doe, d. Morton v. Roe*, B. R. H. 49 *G. III.* cited 2 *Selw. N. P.* 2d edit. 756.

If the term expire pending the suit, the tenant is not barred from shewing that fact. *England, d. Syburn v. Slade*, 4 *T. R.* 683.

It seems that if the defendant refuse on the trial to confess lease, &c., the plaintiff's only remedy for costs is by serving a copy of the consent rule on which the *allocatur* is made, after which an attachment may issue. *Runn. Eject.* 2d edit. 463, who cites *Salk.* 259; See also *Doe, d. Prior and Wife v. Salter*, 3 *Taunt.* 485.

Though statute 16 & 17 *Car. II.* provide, that no execution in ejectment shall be stayed, unless the plaintiff in the writ of error shall be bound for the costs in case judgment be affirmed, &c. yet, by reasonable construction, it is sufficient if he procure proper security to enter into the recognizance of bail; but these may be examined as to their sufficiency, which the plaintiff in error himself cannot be; the practice is to take the recognizance in double the improved rent, and the single costs of the ejectment. *Keene, d. Lord Byron v. Deardon*, 8 *East*, 298. And he is not bound to give the defendant in error notice of his entering into the recognizance pursuant to 16 & 17 *Car. II. c. 8. s. 3.* to pay costs on affirmance. *Doe, d. Webb v. Goundry*, 7 *Taunt.* 427.

The practice has been to take recognizance in double the annual rent of the premises, when that can be ascertained. *Id. ib.*

But he is not required to find bail to join in his recognizance to pay costs on affirmance. *Id. ib.*

Where a new defendant may non pros the plaintiff; but no costs.

As to plea in ejectment.

Where term expires pending suit, defendant may shew this. Remedy for costs.

If defendant bring error, what bail is required.

But if the plaintiff after obtaining a verdict in ejectment sue out a writ of *habere facias possessionem*, without waiting to tax his costs, the defendant's writ of error will not operate as a supersedeas. *Doe, d. Messiter v. Dynely*, 4 Taunt. 289.

VII. OF THE PROCEEDINGS IN EJECTMENT ON OTHER THAN ORDINARY OCCASIONS; RE-ENTRY UNDER THE STATUTE 4 G. II. c. 28; VACANT POSSESSION; MORTGAGEE.

By stat. 4 G. II. c. 28. s. 2. in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due, hath right, by law, to re-enter for the non-payment thereof, such landlord or lessor may, without any formal demand, or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then may affix the same upon the door of any demised messuage; or, in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments, comprized in such declaration in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such declaration in ejectment shall stand in the place of a demand and re-entry; and in case of judgment against the casual ejector or nonsuit, for not confessing lease, entry, and ouster, it shall be made appear to the court where the said suit is depending by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor in ejectment had power to re-enter, then, and in every such case, the lessor in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee, his, her, or their assignee, or other person, claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such ejectment and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without filing any bill for relief in equity, within six calendar months after such execution executed; then the said lessee, his assignee and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error for reversal of such judgment in case the same shall be erroneous, and the landlord or lessor shall, from thenceforth, hold the said demised premises discharged from such lease, and if on such ejectment verdict shall pass for the defendant or defendants, or the plaintiff shall be nonsuited therein, except for the defendant not confessing lease, entry, and ouster, then such defendant shall recover his full costs. The act not to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall, within six calendar months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained

Re-entry under
4 G. II. c. 28.
s. 2.

EJECTMENT; VII. *Re-entry under the Statute.*

by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee are and ought to be performed.

By sect. 3, in case the said lessee, or assignee or other person claiming any right, title, or interest, in law or equity, of, in, or to the said lease, shall, within the time aforesaid, file one or more bill or bills for relief in any court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he shall, within forty days next after a full answer shall be filed by the lessor of the plaintiff in such ejectment, bring into court, and lodge with the proper officer, such sum of money as the lessor of the plaintiff in the said ejectment shall, in his answer, swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and in case such bill shall be filed within the time aforesaid, and after execution is executed, the lessor of the plaintiff shall be accountable only for so much and no more, as he shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises, from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor of the plaintiff, happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord what the money so by them made fell short of the reserved rent for the time such lessor of the plaintiff, landlord, held the said lands.

By sect. 4, if the tenant or his assignee shall, before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his attorney in that cause, or pay into the court where the same cause is depending, all the rents and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee or his executors, administrators, or assigns shall, upon such bill filed, be relieved in equity, he shall have the demised lands, according to the lease thereof made, without any new lease to be thereof made to him.

The preamble to this statute very clearly points out and explains the evil intended to be remedied, and Lord Mansfield, C. J. in the case of *Doe, d. Hitchings v. Lewis*, 1 Burr. 614. recognizes such the intention of the act. The true and professed intention of this act of parliament was to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of possession (from its remaining in the power of the tenant to offer him a compensation at any time in order to found an application for relief in equity) and to limit and confine the tenant to six calendar months after execution executed for his doing this, or else, that the landlord should, from thenceforth, hold the demised premises discharged from the lease. Wilmut, J. added, that the act was made to compel lessees to bring their ejectment or their bill in equity in a limited time.

Intention of this act further explained.

It has been ruled, that tendering of the rent before ejectment delivered, shall stay proceedings under this statute, as well as before its passing. *Goodright, d. Stevenson v. Noright, 2 Bl. R. 746.* And even after judgment against the casual ejector, and before any writ of possession executed, proceedings will be stayed on motion, on payment of all rent due, and costs. *Goodtitle v. Holdfast, 2 Str. 900.* or on summons in vacation, *2 Sel. 129*; but the rent must be calculated only to the last rent day, not to the day of computing. *Doe, d. Harcourt v. Roe, 4 T. R. 883.*

Cases as to tender of rent under this act.

But the court will not after a trial stay the proceedings on payment of rent, &c. the statute only warranting such application before trial. And that statute is not confined to cases of ejectment brought after half a year's rent due, where no sufficient distress was to be found on the premises. *Roe, d. West v. Davis, 7 East, 363.*

It might seem that under this statute a demand of the rent is necessary previously to ejectment, and it has been said, that the act of the 4 G. II. is very perplexed, but the meaning certainly only is, that where there is no stipulation in the lease for entry without demand, you may, notwithstanding, enter without demand, provided six months rent is in arrear, and there is no sufficient distress; otherwise in such cases you must make a demand. *Goodright, lessee of Hare, v. Cator, 2 Doug. 477. 485.*

Of demand of rent under this statute.

Where the witness who proved the demand of the rent had a power of attorney from the lessor for that purpose, which he notified to the tenant, and had ready to produce; held sufficient, though he did not produce it at the time of the demand, the tenant not questioning his authority. *Roe, d. West v. Davis, 9 East, 363.*

How to be proved.

And proof by the lessor of the counterpart of the lease by the subscribing witness, is sufficient proof of the holding upon condition of re-entry in case of non-payment of rent. *Ibid.*

As to proof of holding.

But it is ruled that the statute is not confined to cases of ejectment, brought after half a year's rent due, where no sufficient distress was to be found on the premises. *Ibid.*

Statute not confined.

If the tenant appear, it will be necessary to prove on the trial, as on moving for judgment against the casual ejector, it would have been necessary to have verified by affidavit that there was half a year's rent in arrear before the declaration was served, that the lessor of the plaintiff had a right to re-enter; that no sufficient distress was to be found upon the premises, countervailing the arrears of rent then due; that the premises were untenanted, or the tenant could not be legally served with the declaration, as the case is; and that a copy of the declaration was fixed on the most notorious, and what part of the premises. *Doe, d. Hitchings v. Lewis, 1 Burr. 614*; and this affidavit, where judgment has been obtained against the casual ejector, will be presumed. *Same v. Same.*

What must be proved on trial.

Under this statute, the common consent rule is sufficient, without actual entry, and sealing a lease, and without proving entry and ouster. *Goodright v. Cator, 2 Doug. 486.*

Common consent rule, without actual entry, sufficient.

But in the case of vacant possession, the proceedings must be agreeably to the old forms. See PRACTICAL DIRECTIONS, in case of vacant possession, *post.*

As to vacant possession.

Ejectment by mortgagee.

The next head of practice, not in the ordinary course of proceeding, is where ejectment is brought by a mortgagee.

Having a title to maintain ejectment, a mortgagee proceeds as others having title proceed; namely, by serving a declaration where there is a tenant in possession, or by proceeding where there is not, as in the case of vacant possession.

His motives thereto two-fold to obtain possession, or the rents.

But though the steps be the same, his motive in bringing ejectment may be either to obtain actual possession of the premises, where there is a tenancy at will commenced before the date of the mortgage deed, or to obtain the rent on such a tenancy, or where there is a tenancy for years commenced, also before the date of the mortgage deed.

Where to obtain possession, six months notice to quit is necessary.

If his object be to gain possession of premises let at will, or from year to year, by the mortgagor, prior to the date of the mortgage deed, the mortgagee must give six months notice, in writing, and which must expire previously to the commencement of the suit by ejectment. *Birch v. Wright*, 1 T. R. 378, cited 1 Doug. 21. n. But if the mortgage shall have been made before the lease, or before the commencement of a tenancy from year to year, unless by privity of the mortgagee, no notice previously to ejectment by the mortgagee appears to be necessary. *Keech, lessee of Warne, v. Hall*, Doug. 21. for the lease is void as against a prior mortgagee. See *Birch v. Wright*, 1 T. R. 378. 380.

Where not.

The case of *Moss v. Gallimore*, 1 Doug. 279, by which it was decided that an ejectment would lie when the mortgagee only intended to get possession of the reserved rent, is no longer held to be law; since the legal estate only can prevail in ejectment. See *Doe v. Wroot*, 5 East, 132, and the cases cited. *Id.* 139. n.

Quere, As to the application of cases by Mr. Serjeant Sellon.

Mr. Serjeant Sellon, in quoting the case of *Birch v. Wright*, above mentioned, would seem to inculcate that a mortgagee becoming so, subsequent to the granting a lease for years, might eject the tenant under that lease; in the quotation of that case it is said, "but if subsequent to a lease granted, or even pending a tenancy from year to year, the mortgage is made, mortgagee must give six months notice," thereby implying, as I understand the statement, (and by the subsequent words, "that is, if he wishes to gain possession,") that by giving six months notice to the lessee, he, the mortgagee, may obtain the possession, notwithstanding the existence of such prior lease; whereas it must be presumed, that the mortgagee must have taken the estate, subject to any existing *bond fide* lease, even though that lease reserved only a pepper-corn of rent, and the case of *Birch v. Wright*, it may be apprehended, only so applies to the determination of a tenancy at will, or from year to year, by a mortgagee, on giving six months notice; that is, what the mortgagor might have done, the mortgagee may do; but what the mortgagor could not do, the mortgagee is equally restrained from doing. See *Birch v. Wright*, 1 T. R. 380. the language of Buller, J. therein.

But ejectment by mortgagees may be stayed, and how.

Mortgagees, however, even after commencement of ejectment for non-payment of mortgage-money, &c. may be prevented from obtaining possession of the mortgaged premises by the liberty vested in whoever may be defendant in the ejectment to pay off the mortgage,

By stat. 7 G. II. c. 20, where any action shall be brought on any bond for payment of the money secured by mortgage or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of his majesty's courts of record, at Westminster, or in the court of great sessions in Wales, or in any of the superior courts in the counties palatine of Chester, Lancaster, or Durham, by any mortgagee, his executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, &c. and no suit shall be then depending in any of his majesty's courts of equity in England, for the foreclosing or redeeming of such mortgaged lands, &c. if the person having right to redeem such mortgaged lands, &c. and who shall appear and become defendant in such action, shall, at any time pending such action, pay unto such mortgagee, or in case of his refusal, shall bring into court where such action shall be depending, all the principal monies, and interest, due on such mortgage, and also all such costs as have been expended in any suit at law or in equity, upon such mortgage (such money for principal, interest, and costs to be ascertained and computed by the court, where such action is or shall be depending, or by the proper officer, by such court to be appointed for that purpose) the money so paid to such mortgagee or brought into such court, shall be deemed to be in full satisfaction and discharge of such mortgage, and the court shall and may discharge every such mortgagor or defendant of, and from the same accordingly; and shall, by rule of the same court, compel such mortgagee, at the costs and charges of such mortgagor, to assign, surrender, or re-convey, and such mortgaged lands, &c. such estate and interest as such mortgagee hath therein, and deliver up all deeds, evidences, and writings in his custody, relating to the title of such mortgaged lands, &c. unto such mortgagor, who shall have paid or brought such monies into the court, his executors or administrators, or to such other person as he shall, for that purpose, nominate and appoint.

By sect. 3. the act not to extend to any case where the person against whom the redemption is prayed, shall (by writing under his hand, or the hand of his attorney, agent, or solicitor, to be delivered before the money shall be brought into such court at law, to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side, nor to any case where the right of redemption to the mortgaged lands and premises in question, in any cause or suit, shall be controverted or questioned by or between different defendants in the same cause or suit, nor shall be any prejudice to any subsequent mortgagee or subsequent incumbrancer.

The points arising on, and which appear to have been decided upon this statute, are few. Cases on this statute.

By the act now mentioned, all just allowances and deductions are to be made to the mortgagee, and agreeably thereto was decided the case of *Goodright v. Moore*, *Bar.* 176; but it seems that other securities, collateral to the mortgage, and which are a

EJECTMENT; VIII. *Consolidating of Ejectments; Costs, &c.*

lien upon the estate, will take the case out of the provisions of this act. See *Felton v. Ash*, *Bar.* 177; but where the assignees of a mortgagee also insisted upon the payment of a debt on bond, and of another upon simple contract, due to them in their own right, the rule for staying proceedings, on bringing in the mortgage-money and costs, was made absolute; and in this case it was said *per cur.* that a bond is no lien in equity, unless where the heir comes to redeem. *Bingham, d. Lane and Others v. Gregg*, *Bar.* 182; and therefore it may be presumed that the application in *Felton v. Ash*, *Id.* 127, was made on the part of the heir.

It has also been determined, that where there are two or more mortgages, the court will not compel a redemption of one without the rest. *Roe, d. Kaye v. Soley*, 2 *Bl. R.* 726.

Notwithstanding a former decision, *viz.* *Skinner v. Stacey*, 1 *Wils.* 80, the court will not stay the proceedings in an ejectment brought by a mortgagee against a mortgagor, on the latter paying principal, interest, and costs, if the mortgagor has agreed to convey the equity of redemption to the mortgagee. *Goodtitle, d. Taysum v. Pope*, 7 *T. R.* 185.

If a mortgagee recover possession of the mortgaged premises under a judgment in an undefended ejectment, the court has no jurisdiction to restore, on payment of the debt, interest, and costs, the possession to the mortgagor, who has not appeared. *Doe, d. Tubb v. Roe*, 4 *Taunt.* 887. But if the recovery be had against a tenant of the mortgagor, the court will set aside the judgment, and let in the mortgagor to defend as landlord, that he may be in a condition to apply to the court to stay proceedings on the terms of the statute. *Id. ib.*

VIII. WHERE SEVERAL EJECTMENTS MAY BE CONSOLIDATED; COSTS, &c.

Where several
ejectments may
be consolidated.

Where there are several actions in ejectment by the same lessor of the plaintiff for the same premises, they will be consolidated. See title CONSOLIDATING ACTIONS, p. 804, *ante*. Also *Doe, d. Pulteney v. Freeman*, and *Same v. Caven*, 2 *Sel.* 144, in which last case Lord Kenyon, C. J. is reported to have said, "It was a scandalous proceeding; they all depended precisely on the same title, and ought to be tried by the same record."

Of costs in
ejectment.

The remedy for costs in ejectment is by an attachment, see page 543, *ante*.

But the court will not refer it to the prothonotary to take an account of monies received by the lessor of the plaintiff in respect of annuities, or to ascertain the costs in an action of ejectment. *Doe, d. Johnson v. Roe*, 6 *J. B. Moore*, 331.

Where the lessor of the plaintiff having entered into the common rule to pay costs, died between the commission day and the trial, and the plaintiff was nonsuited on the merits: Held, that the executor of the lessor was not liable to pay the costs. *Doe, d. Pain v. Grundy*, 1 *B. & C.* 284. 1 *D. & R.* 487. *S. C.*; but this report states that the death occurred *after* the commission day.

But where a second ejectment is brought, the proceedings will, on motion, be stayed until the costs of the first are paid, and this

although brought in a different court; and this rule applies to whether the former plaintiff, or whether the former defendant, bring the new ejectment. See *Keene, d. Angel v. Angel*, 6 T. R. 740. *Thurstout, d. Williams v. Holdfast*, 6 T. R. 223. Several other cases might be cited in support of this position, but it is a point so well established, and it is so consonant with the principle upon which the courts decide in similar cases that further observations in this respect may now be spared. But it has been decided that although the court will stay proceedings until the costs in these cases, and also those of an action for mesne profits depend thereon be paid, yet they will not extend the rule to include the damages in the action for the mesne profits, however vexatious the proceedings of the lessors of the plaintiff may have been. *Doe, d. Church v. Barclay*, 15 East, 233.

Nor will the court stay the proceedings in the ejectment until the taxed costs of a suit in equity brought by the same party for the recovery of the same premises are paid. *Doe, d. Williams v. Winch and Others*, 3 B. & A. 602.

But where a rule has been obtained for staying the proceedings in ejectment till the costs of a former ejectment have been paid the court will not interfere, and permit the defendant in case those costs are not paid before a certain day to be named by the court, to non pros the ejectment pending. *Doe, d. Sutton v. Ridgway*, 5 B. & A. 523.

But it has been ruled, that the lessor of the plaintiff being in custody upon an attachment for costs in a former ejectment by the same lessors, which attachment is in the nature of a *capias ad satisfaciendum*, there is no reason to grant a rule to stay proceedings in another action brought by the same lessors on the same demise. *Benn, d. Mortimer v. Denn*, Bar. 180.

It may be questionable, however, whether such a custody would be considered as sufficiently satisfying the costs of a former proceeding at the present day; for a litigious plaintiff, to whom custody might be familiar or elemental, and lamentable is the fact such there are, would be thus countenanced in repeatedly bringing ejectments: and it is the more probable that a second, or repeated ejectment, would not, under such circumstances, be now allowed, especially as the court has since refused leave to a plaintiff to discontinue after a special verdict in order to adduce fresh proof in contradiction of that verdict. *Roe, d. Gray v. Gray*, 2 Bl. R. 815. See also *Weston v. Withers*, 2 T. R. 511. And certainly with the same view to throw impediment in the way of a harassing and vexatious disposition, it has been ruled that no new ejectment shall be brought by the defendant after recovery against him till he has quitted the possession, or the tenants have attorned to the plaintiff so as he be in possession, and the defendant out. *Fenwick v. Grosvenor*, 1 Salk. 258. Mr. Serjeant Sellon adds, "And I conceive (upon the principle of cases) cited until he has also paid the costs of the former ejectment," and where an ejectment was brought by the fraudulent assignee of an insolvent debtor, proceedings were stayed till the costs of the former ejectments, which had been brought by the debtor himself, were paid. *Doe, d. Chambers v. Law*, 2 Bl. R. 1180. but Gould, J. said he gave

EJECTMENT; IX. PR. DI: *On part of Pl. generally, K. B.*

As to whether
ejectment on the
same title may be
repeated, and as
to perpetual in-
junction.

no opinion as to whether, in a fair case, the assignee of an insolvent debtor should be called upon for former costs before he was suffered to proceed to try a new ejectment on the title of his principal. Where a defendant in ejectment pending a writ of error, brings a new action, the court will stay the proceedings on the second ejectment till the error is determined. 2 *Bac. Abr.* 441.

It has been said, *Earl of Bath v. Sherwin*, 10 *Mod.* 2. that it is a known maxim of the common law that a man may try his title as often as he pleases in an ejectment, and in *Bac. Abr.* it is also said that one of the advantages attending this action is, that a man may have a remedy *toties quoties*, he being allowed to bring as many ejectments as he pleases. But this has sometimes proved a very great mischief, and yet it seems to be without remedy, for though it has been attempted in Chancery after three or four ejectments by a bill of peace to establish the prevailing party's title; yet it hath been always denied to alter the course of law, for that every termor may have an ejectment, and every new ejectment supposes a new demise, and the costs in ejectment are a recompence for the trouble and charge to which the possessor is put. But where the suit begins in Chancery, for relief, touching pretended incumbrances, on the title of lands, and that court has ordered the defendants to pursue an ejectment at law there, after one or two ejectments tried, and the right settled to the satisfaction of the court; it hath ordered a perpetual injunction against the defendant, because there the suit was first attached in that court, and never began at law; and such precedent incumbrances appearing to be fraudulent and inequitable against the possessor, it is within the compass of the court to relieve against them. *Bac. Abr.* tit. *Ejectment*.

But in the case of the *Earl of Bath v. Sherwin*, above cited, the court of Chancery, in a most vexatious prosecution of ejectments, refused to grant a perpetual injunction: the judgment for the dismissal of the bill was afterwards reversed by the House of Lords, and it was directed that the perpetual injunction prayed should be issued. *Bro. Cas. Parl.* 270.

As to quiet possession after execution in ejectment executed, further, see title *HABERE FACIAS POSSESSIONEM*.

IX. PRACTICAL DIRECTIONS.

ON THE PART OF THE PLAINTIFF, GENERALLY, K. B.

The declaration being prepared agreeably to the foregoing notes, is to be engrossed; blanks are kept by the stationers for single demises. See FORMS, No. 1, 2, 3, or 4, as occasion may require. The declaration must be entitled specially of the previous term, if the title accrued after the commencement of that term.

The day of appearance, to be inserted in the notice, must be the first day of the following term, if in London or Middlesex; if elsewhere, the notice must be to appear the next term generally.

Before the essoign day of every term, whether a town or country cause, serve a copy of the declaration on the tenant; or if more than one, on each tenant in possession; service on the essoign day, or on Sunday, is ill.

Service on the tenant himself, any where, is good; on his wife, at the husband's dwelling; if on other relative, or on a servant, service then must be on the premises, and service on them is only good when it appears the tenant keeps out of the way to avoid service, and that endeavours have been made to serve him, and it shall also appear by affidavit that the proceeding actually reached his hand in time, and that he was apprized of its meaning. But if there be any ground for doubt, read over the cases noted page 534, ante.

On serving any party, read over, aloud, in his presence, the notice to appear, subscribed at the foot of the declaration; thus to read it, is to be preferred to verbal explanation. If the tenant or person to whom the declaration may be offered, refuse to receive it; or if he close the door, or otherwise avoid receiving it; or if he threaten the person serving it, if he come near for that purpose; or if the servant of refuse to call the tenant, the service will, on a statement of the facts, verified by affidavit, be allowed to be good, though the declaration shall have been stuck against the door, thrown in at the window, or left at the house. See the observations and cases, if necessary, page 536, ante.

The defendant or tenant, if the cause be in London or Middlesex, and the ejectment shall have been served before the essoign day, has four days, inclusive, in which to appear, after the motion for judgment against the casual ejector. On the first day of term, therefore, or as soon as may be after that day, let the affidavit of the service be duly made. If the motion be made late in the term, the court will allow two or three days only; if moved only within three or four days before the end of the term, the defendant has till two days before the essoign day of the next term in which to appear. For the affidavit see FORMS, No. 5, subjoined. If service shall have been attended with any special circumstances, those should be particularly stated as a ground for the discretionary interference of the court, whether to allow or disallow the service. The declaration of which that served was a correct copy, must be annexed to this affidavit. Of course a copy will have been kept for future use.

When sworn, the affidavit indorsed with the title in the cause, as thus: "(Court) Doe (the usual nominal plaintiff) on the demise of ——— (the lessor of the plaintiff Doe) v. Roe," is given to counsel, also indorsed "to move for judgment against the casual ejector;" counsel 10s. 6d.; apply at the office of the clerk of the rules in the evening; pay 9s. 2d. And the rule for judgment cannot be drawn up conditionally. 1 Chit. R. 499.

See rules for judgment Nos. 6, 7, 8, FORMS subjoined, and in this court it is necessary that the motion be made the same term with that mentioned in the notice to appear.

If the ejectment be brought in any other county, and the tenancy be not under lease or agreement in writing, no time is gained by serving the declaration immediately before Michaelmas or Easter terms; it is therefore usual to serve the ejectment other than in London or Middlesex, before an issuable term preceding the assizes held in the place or county where the premises are situated.

The demise must be in writing to bring the case within stat. 1 G. IV. c. 87. Doe, d. Earl of Bradford v. Roe, 5 B. & A. 770. And if in writing, a tenancy for three months is within the statute. See Doe, d. Phillips v. Roe, 5 Id. 766. S. C. mentioned page 533, ante.

In such country cases, therefore, the appearance may be entered at any time within four days, exclusive of the day on which the term ends, after the end of such next issuable term.

EJECTMENT; IX. Pr. Di. On part of Pl. generally, K. B.

But where the tenancy is, or rather was, under lease or agreement in writing, it will be necessary to advert to the statute 1 Geo. IV. c. 87, s. 1, fully stated, page 530, ante. And see also No. 15, clause to be added to consent rule under this statute.

And although this be a statute greatly beneficial to the landlord whose rightful possession is denied, yet he is still at liberty to pursue the practice as if such statute had not been made.

And it is important that the practitioner bear in mind the latter part of the R. G. M. 31 G. III. which more particularly concerns him: that part is as follows: And it is further ordered, that unless the rule for judgment shall be drawn up and taken away from the office of the clerk of the rules within two days after the term in which the ejectment shall be moved, no rule shall be drawn up or entered in the book, nor shall any proceedings be had in such ejectment.

At the expiration of the time mentioned in the rule nisi, search the ejectment books, which are kept at the several judges chambers for the plea and consent rule; if filed or entered, the judge at whose chambers it will have been found, will sign it, and the plaintiff's attorney obtains it on giving a receipt for the same. Further, as to consent rule, see ss. XII. XIV. The defendant's attorney leaves space for the signature of the plaintiff's attorney, to be added by him to the consent rule; the consent rule, or rather the agreement for the consent rule, is then to be carried to the clerk of the rules; pay ——— filing the same, and for consent rule. The consent rule may be limited to confessing lease and entry only. See the above sections.

The landlord, or other person appearing without the tenant, sign judgment immediately against the casual ejector; otherwise, though the plaintiff obtain a verdict against the person who defends, yet, not being in possession, the writ of possession cannot be executed against such defendant.

The judgment is signed as mentioned, sect. X.

The issue may be now made up and proceeded on, whether as against landlord or tenant, or as against both, as the case may be, as in common cases as, viz. with a memorandum if the action be by bill; without, if it be by original. A copy of the consent rule, as also a copy of the other rule, if any, annexed to the plea, should also be annexed to the issue when delivered; these copies, so annexed, are office copies, obtained of the clerk of the rules, and in stating the plea, say, "in a plea of trespass and ejectment." The plaintiff may have a summons for particulars for what premises the defendant means to defend. See, if necessary, title PARTICULARS, Bill of Particulars.

On verdict for the plaintiff against the tenant in possession, give rule for judgment; tax costs; sign final judgment; issue execution for the costs, either capias ad satisfaciendum to take the body, or fieri facias to levy the amount on the goods; or, agreeably to FORMS Nos. 33, 34, 35, the writ of capias ad satisfaciendum or fieri facias may be incorporated with the writ of habere facias possessionem.

*By the practice of K. B. the plaintiff in ejectment is not entitled to sign judgment against the casual ejector, until after the postea is brought in on the day in banc, but where after verdict by default of defendant, the plaintiff issued out a writ of possession on the 6th of November, without producing the postea, and executed it on the 12th, without any objection on the part of the defendant until afterwards, the court refused to set aside the writ, it appearing that the defendant had sustained no prejudice, and said that if he had, that was matter of reference to the Master. *Davis v. Williams*, 2 D. & R. 229.*

But if the verdict be against the landlord, the plaintiff cannot issue execution without leave of the court; for this purpose counsel must

be instructed to move for a rule to shew cause why, on the production of the postea and office copies of the two rules, the plaintiff may not be at liberty to take out execution against the casual ejector; counsel 10s. 6d.; rule —; move to make it absolute as in other cases. The entry of the judgment will be varied as to whether it be for the whole or for part of the premises; whether it be part for the plaintiff and part for the defendant; precedents for each of these cases will be found in the FORMS subjoined.

For other points, see titles INFANT; PARTICULARS of DEFENCE; PARTICULARS, BILL of PARTICULARS; STAYING PROCEEDINGS.

X. PRACTICAL DIRECTIONS.

ON THE PART OF THE PLAINTIFF, WHERE THE DEFENDANT DOES NOT APPEAR TO CONFESS LEASE, ENTRY, AND OUSTER. K. B.

If the defendant do not appear on the trial, and pursuant to his undertaking, by the terms of the consent rule confess lease, entry, and ouster, the plaintiff is not, as before the statute 1 G. IV. c. 87. he was, nonsuited, as mentioned and explained page 541, ante; but under that stat. s. 2. which see page 532, ante, the production of the consent rule shall in all cases be sufficient evidence of lease, entry and ouster, and the plaintiff, in due time, signs judgment against the defendant. This may be done the day in banc following the day appointed for the trial, that is, the first day of the term next after the assizes, if it be a country cause, and if it be a town cause, immediately after that day, that is to say, the day next after the day in bank succeeding the day of trial. And a writ of possession may issue on the same day, although the postea be not delivered over at the time by the associate to the attorney for the plaintiff. *Doe, d. Davies & Wife v. Roe*, 1 B. & C. 118. It should also be recollected that the plaintiff may now go into evidence of mesne profits, and that the jury under this action may give a verdict upon the whole matter both as to recovery of the whole or any part of the premises, and also as to the amount of damages for mesne profits.

The practice as to when the judgment may be signed is different in C. P. See sect. XIV. post.

The judgment against the defendant so failing to appear, and confess lease, entry, and ouster, is to be signed upon paper; take this, as directed, post, in case he do not appear at all, the consent rule, and the postea, together with an affidavit of the due service of notice of trial, and that the defendant did not appear thereon, to the master, who taxes the costs, for which and the amount of damages found by the jury, writ of possession incorporating *fi. fa.* issues in the usual way.

Hitherto it has been supposed that appearance has been duly entered; a consent rule and plea duly filed; that trial has occurred; that verdict and judgment against defendant thereon, and taxation of costs and execution have been obtained; and it now remains to mention, that in case no appearance have been entered, the judgment may at first be signed against the casual ejector.

Having searched the judge's books, and found no due appearance therein, file common bail for the casual ejector, agreeably to R. M. 33 Car. II.; obtain rule for judgment at the office of the clerk of the rules, sign judgment by making an incipitur on paper, and also on the roll; the clerk of the judgments signs the rule for judgment, and marks the judgment paper and roll; pay 4s. 2d.

If the proceedings are by original, it is said, appearance needs not in the above case be entered; the rule mentions only common bail.

XI. PRACTICAL DIRECTIONS.

ON THE PART OF THE PLAINTIFF ON OTHER THAN ORDINARY OCCASIONS; RE-ENTRY UNDER THE STATUTE 4 G. II. c. 28; MORTGAGEE; VACANT POSSESSION.

See sect. VII. ante.

The declaration and previous proceedings are the same as those already detailed, remembering to lay the demise after the rent became due.

But on the usual motion for judgment against the casual ejector, see sect. IV. ante, an affidavit of the facts attending the service of the ejectment must be made; but it is essential that the affidavit state that half a year's rent was due; that no sufficient distress was to be found on the premises, and that the lessor had power to enter. Observe whether the clause for re-entry, in case of non-payment, renders it necessary that a demand should be previously made: if so, demand must be made; but if not, no demand is necessary.

Mortgagee.

As to proceedings by mortgagee, and in cases of vacant possession, see sect. VII.

Vacant possession.

Where the possession is vacant, all the old FORMS of proceeding in ejectment must be observed; lease, entry, and ouster will not be confessed, because no one appears as tenant to be served, and therefore before judgment can be obtained against the casual ejector, a formal entry must be made on the lands, and while in possession of or on the soil, the lessor of the plaintiff seals a lease thereon. Where the estate is situate in different counties, separate entries must be made in each; and where the premises were let to different tenants, separate entries will be also necessary. Therefore proceed thus:

Let the lease, No. 30, FORMS subjoined, be prepared; then the claimant, taking with him the person named therein as lessee, enters upon the premises, and whilst thereon, the lease is duly executed. The claimant then quits the land for a minute or two, leaving the lessee in possession; let any one then force the lessee off the premises; for this ejection the lessee may become plaintiff in ejectment, and the person so pushing him off the premises thus becomes the defendant, and is the casual ejector; the declaration is the same as in other cases, except that the forenamed parties must have real being; and the declaration is then served on the defendant, who, for the time, purposely stays on the premises. An attention to the form of the declaration in ejectment, and to the explanation before offered, will familiarise the young practitioner to another application of the form of this most useful fiction.

After the service of the declaration, the affidavit, No. 32, FORMS subjoined, must be made, inserting or omitting the first clause relating to the letter of attorney, as the case may be. But where one copy of the declaration was sworn to have been fixed on the premises, and another served on the lessee, but not on the premises, it is necessary to state that such lessee was tenant in possession at the time of the service. Doe, d. Seabrooke v. Roe, 4 J. B. Moore, 350.

The motion for rule for judgment against the casual ejector, must be made as before.

In C. P. there is no necessity for this affidavit. See sect. XIV.

If it be inconvenient for the claimant to go on the premises and seal the lease, he may empower another to do it for him; in which case the letter of attorney, No. 31, FORMS subjoined, must be executed.

XII. PRACTICAL DIRECTIONS.

ON THE PART OF THE DEFENDANT GENERALLY, K. B.

See sect. VI.

When the appearance must be entered is mentioned page 548, ante.

In country ejectments, served before the essoign of Michaelmas or Easter terms, the appearance must now be entered within four days after the end of same terms respectively, and not postponed to the fourth day after Hilary or Trinity terms, as formerly. See page 548, ante.

Whether the tenant appear alone, or in conjunction with another, will, of course, depend upon whether he be mere tenant, or whether he be entitled, or consider himself entitled to the premises; if mere tenant, his landlord may appear and defend in their joint names; if the tenant will not defend jointly, or by agreement with his landlord separately, the landlord may appear alone; or if the tenant himself, on his own presumed or actual title will defend, he, in that case, of course appears alone.

But if the landlord, or person other than the tenant in possession intend to appear and defend without the tenant, he not consenting to defend with or without the landlord, counsel's hand must be obtained to a motion-paper, indorsed, "to move that ——— (such person) may be made defendant instead of Roe, (the nominal) the now defendant;" counsel 10s. 6d. The rule thereon must be obtained at the office of the clerk of the rules; pay ———; annex copy to the plea; see, rule for this purpose, No. 7, FORMS subjoined.

And where a landlord defrays the cost of defending an ejectment in the name of an illiterate tenant, who gives a retraxit of the plea, and cognovit of the action, the court will set aside the retraxit and cognovit, and permit the lessor to defend as landlord. *Doe, d. Locke v. Franklin*, 7 Taunt. 9.

The appearance to be of the term mentioned; the notice is thus entered. Get a blank consent rule; it will be agreeably to No. 10, FORMS subjoined. Its form is altered since the statute 1 G. IV. c. 87. No. 9 is the old form. And the consent rule for admitting the landlord to defend, needs not set out the christian and surname of the lessor of the plaintiff. *Doe v. Reid and Another*, 3 J. B. Moore, 96. Whoever is to defend, his name is to be inserted instead of that of the nominal defendant. If defence be intended for part only of the premises mentioned in the declaration, such intention must be expressed in the margin of the consent rule; see, for this, No. 9, FORMS subjoined.

The consent rule may be drawn up for confessing lease and entry only, agreeable to No. 19, FORMS subjoined.

Having filled up the consent rule, or rather the consent of the attornies, that such their consent shall be made a rule of court, the defendant's attorney signs the same, leaving a blank for the signature of the plaintiff's attorney; an issuable plea, agreeably to the rule, is to be engrossed, usually the general issue, "in a plea of trespass and ejectment," see No. 20, FORMS subjoined; this is to be annexed to the consent rule; common bail is then to be filed, pay 1s. 2d. in term, 1s. 6d. in vacation; or appearance if by original entered with the filazer, pay 3s. 6d. See, if necessary, titles APPEARANCE, COMMON BAIL; then leave the consent rule, with the plea annexed, at the chambers of either of the judges, K. B.; pay on leaving 2s. The rule, if there be one to admit the landlord to defend with the tenant, or alone, must also be annexed. This rule will be agreeably to No. 7, FORMS subjoined.

The defendant may, at this stage of the cause, or before, if he be doubtful for what the ejectment is brought, obtain a summons for a bill of particulars. So he may be called upon for particulars of for what premises he means to defend.

EJECTMENT; XIII. XIV. PR. DI. Plaintiff, C. P.

And should the defendant have suffered judgment to go by default, it may, on an affidavit of merits and no trial lost, be set aside upon payment of costs, and taking short notice of trial. Dobbs v. Passer, 2 Str. 975. See also Doe, d. Troughton v. Roe, 4 Burr. 1996.

From thenceforth the proceeding to trial, with relation to the defendant, is the same as in common cases of trespass, or other action.

If he obtain a verdict, or if the plaintiff be nonsuited, the costs are taxed on the postea; for the amount of the costs, a writ of capias ad satisfaciendum is to be issued against the plaintiff; but such plaintiff being nominal, the writ is shewn under seal to his lessor, who, at the same time, is to be personally served with a copy of the consent rule; shew the original; the costs are then also to be demanded, which, if not paid, an affidavit of the facts may be made, on which an attachment will be granted against such lessor. For the affidavit, see No. 29, FORMS subjoined.

Where one tenant in common brings ejectment.

Where one tenant in common brings ejectment for the recovery of his moiety, and where the other tenant intends to resist such ejectment, the application to be made defendant instead of the tenant in possession, on the terms of confessing lease and entry only, may be made by summons in vacation. To ground the application, the affidavit may be made agreeably to No. 11, FORMS subjoined, or agreeably to the facts; and it should seem that in each ejectment such affidavit should be made; that is to say, as many rules as may be necessary, so many must be the affidavits to found the several applications.

XIII. PRACTICAL DIRECTIONS.

ON THE PART OF THE DEFENDANT ON OTHER THAN ORDINARY OCCASIONS; RE-ENTRY UNDER THE STATUTE 4 G. II. c. 28; MORTGAGOR.

See sect. VII. If the defendant be desirous of continuing in possession, and he be able to pay the rent, he may, at any time before trial, take out a summons to shew cause why, upon payment of the rent in arrear, and the costs to be taxed, all further proceedings should not be stayed.

This, it is said, may be done, even after judgment against the casual ejector, and before any writ of possession. Goodtitle v. Holdfast, Str. 900.

When mortgagor defendant.

Mr. Impey, Pr. K. B. page 608, says, "I applied under this act (7 G. II. c. 20.) after a writ of possession by summons to pay principal, interest, and costs, and the lessor of the plaintiff's attorney objected to come into the terms. Mr. Justice Buller said, 'Do you choose to have a bill to redeem? if so, I cannot relieve.' But by consent he made the order. Doe ex dem. Bunce v. Roe, 2 T. 1791."

XIV. PRACTICAL DIRECTIONS.

ON THE PART OF THE PLAINTIFF, GENERALLY, C. P.

Generally, the decisions in relation to the practice in ejectment, in any one of the superior courts, apply equally to all of them, and therefore a reference to such decisions, as to any practical point, and to the Practical Directions, K. B. may afford the requisite information, remembering however as to offices, officers, &c. that such reference must be understood mutatis mutandis.

Yet the course of practice in C. P. differs in some points from that of K. B.; which difference will now be noted.

In C. P. the motion for judgment against the casual ejector, if in a country cause, and the declaration shall have been served in Michaelmas or Easter terms, must be made in the term in which the tenant has notice to appear.

As to whether the court would now consider the notice to appear irregular, if it were not signed with the name of the nominal defendant, is doubtful; Mr. Impey is particular in recommending that it be so signed, and citing Peaceable v. Troublesome, Bar. 172, adds "Contra, K. B. 3 T. R. 351. I remember this court very lately refused the motion [for judgment against the casual ejector] for want of that name." Imp. C. P. 648.

By R. G. T. 33 C. II., the plaintiffs for the future shall take nothing by motion made for judgment against the casual ejector for default of appearance, unless such motion be made within one week next after the first day of every Michaelmas term, and of every Easter term, and of every Trinity term, but in a country ejectment, the judgment may be moved for at any time in the term in which notice to appear is made, or on the last day of that term.

But it seems that the above rule only relates to declarations served upon tenants in possession in London and Middlesex, Negative v. Positive, Bar. 172.

And regard should be had to the stat. 1 G. IV. c. 87, which see page 530, ante.

The motion paper needs not be delivered by a serjeant in open court. Pay filing affidavit, if a country cause 2s. and of course keep a copy of the affidavit.

Search with the filazer of the proper county for appearance within four days after motion, if a town cause; if a country cause, the defendant having the whole term to appear in, the motion for judgment is not made till late in the term, and the defendant has till four days after the term in which he has notice to appear.

But if the case be one within the statute 1 G. IV. c. 87, reference for the practice should be had thereto. See same page 530, ante.

The secondary draws up the rule for judgment; pay —. Enter, on a sheet of paper, the declaration as far as the names of the plaintiff and defendant; file warrants of attorney and let the clerk mark the judgment paper, pay 8d.; the judgment is then to be signed at the prothonotary's office; pay 12s. 8d. and note a point of difference of practice in the two courts. On signing judgment, K. B. common bail must be filed, though it is said, that in proceedings by original appearance in that court need not be entered; so in this court, C. P. appearance is not to be entered for the defendant previously to signing judgment. Execution may now issue. See Nos. 33, 34, 35. These may be used mutatis mutandis, title Habere facias possessionem, post. At the time of signing the judgment, a roll may be had of the prothonotary's clerk, on which to enter up the judgment.

If the defendant appear, and plead, plaintiff's attorney will observe another deviation from the practice in K. B. In that court the consent rule and plea may be filed at the chambers of any one of the judges of that court; but in C. P. the same are filed at the prothonotary's office as mentioned, post; and the secondary draws up two rules thereon; annex one of these rules to the copy of the issue delivered; the issue is made up as in K. B. by original, that is to say, begin with the term the declaration is of, and add, when necessary, imparlance to the term of which the plea is entitled, but of course leave out the word "where-soever," &c. and substitute the word "here." See title ISSUE, and say, "in a plea of trespass and ejectment;" payment for the issue is now unnecessary.

EJECTMENT; XV. Pr. Dt. *On the part of Defendant, C. P.*

The record is made up as in the case last mentioned; the first placitum of the term the issue is joined; and in the jurata, add, "in a plea of trespass and ejectment."

By reason of the defendant's refusal to appear at the trial and confess lease, entry and ouster, the plaintiff was formerly called and non-suited, and the judgment might in this court, (before the late act, viz. statute 1 G. IV. c. 87, s. 2, which see page 532, ante,) be signed immediately, and execution taken out. See 2 T. R. 779; but that statute obviates this unmeaning anomaly altogether, as to the non-appearance of the defendant.

On obtaining a verdict, wait four days, as in other cases; tax costs, &c. as in K. B. But as to suggestion of death, &c.; see PRACTICAL DIRECTIONS, K. B.

Vacant possession.

Where the possession is vacant, the proceeding on the part of the plaintiff in this court differs from that in K. B. in this point; namely, in C. P. after compliance with the formalities of entry, lease, ouster, and service of declaration, no affidavit of the facts, or of the service of the declaration needs be made; neither is any motion for judgment against the casual ejector necessary. The practice in this court is, on the first day of the term, to give a rule to plead as in other cases, and if no plea filed and appearance entered in due time, that is, in four days, sign judgment, but it does not seem settled whether any person may, or not, appear and defend. It is said, 2 Sel. 133, after citing Bull. N. P. 296, that a new ejectment must be brought, and that no one will be allowed to appear and defend, but see also Barr. 177. cited Imp. K. B. 628. In Bull. N. P. 96, and it is said, in cases of vacant possession, no person claiming title will be let in to defend, but he that can first seal a lease must obtain possession. And no defence can be made by the defendant who is the real ejector, and the landlord was refused.

But see Sty. 368, which seems the much more reasonable doctrine. "If one move that the title of land doth belong unto him, and that the plaintiff hath made an ejector of his own, and thereupon prays that, giving security to the ejector to save him harmless he may defend the title, C. P. will grant it, but will not compel the plaintiff to confess the lease, entry, and ouster, except he will be ejector himself. But it is not so in K. B. for there in both cases they will compel him to confess lease, entry, and ouster. But quære, for I have not known it so ruled."

XV. PRACTICAL DIRECTIONS.

ON THE PART OF THE DEFENDANT, C. P.

The appearance is to be entered in the times mentioned, sect. VI. ante.

By R. G. H. 2 G. II, it is ordered, that the secondaries shall, in the morning next after the end of every term, and at other times, when required, produce and shew to any person or persons who shall demand the same, their alphabetical paper of ejectments moved or delivered in court each term.

This paper, therefore, the plaintiff will search, and the appearance is thus entered. Get the blank consent rule from the stationer's. By R. G. H. 1 & 2 G. IV. C. P. 5 J. B. Moore, 310, in every action of ejectment, the defendant must in future specify in the consent rule for what premises he intends to defend, and must consent in such rule to confess upon the trial that the defendant (if he defend as tenant, or in case he defend as landlord that his tenant) was, at the time of the service of the declaration in the possession of such premises, and if upon the trial the defendant shall not confess such possession, as

well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed. See No. 14, FORMS subjoined.

This rule, with the plea of not guilty, No. 20, FORMS, is to be taken to the filazer of the county, with whom the appearance is to be entered; the filazer enters the appearance from a precipe, No. 18, FORMS subjoined, and signs the rule, writing thereon "appearance entered;" pay 2s. 6d.; leave plea and rule at the prothonotaries office; pay 2s.

If part only be defended, give the notice No. 12, FORMS subjoined.

If the verdict be for the defendant, or in case of nonsuit, the costs being taxed, are recovered by execution as mentioned, sect. X. ante.

It appears that if the sheriff deliver more than the writ of possession warrants, the court will, on motion, direct a re-delivery without putting the defendant to an ejectment.

And see *Dobbs v. Passer*, 2 Str. 975. *Doe, d. Troughton v. Roe*, 4 Burr. 1996, cited sect. XII. ante.

XVI. FORMS IN EJECTMENT.

[Court.]

_____ term, in the _____ year of the reign of king George _____ the fourth.

Venue, to wit, *John Doe* complains of *Richard Roe*, being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself: For that whereas _____ (*the lessor of the plaintiff*) on the _____ day of _____ (*this may be any day after the title commenced, unless it shall have commenced the same term of which the declaration is entitled, in which case the declaration must be entitled specially*) in the _____ year of the reign of our lord the now king, at Westminster, in the said county of _____, did demise, grant, and to farm let to the said *John Doe*, the manor of _____, in the county of _____, with the rights, members, and appurtenances thereunto belonging, and also the rectory of the parish church of _____, in the county aforesaid, and also ten messuages, ten barns, ten stables, ten orchards, one hundred acres of arable land, one hundred acres of meadow, one hundred acres of pasture, one hundred acres of land covered with water, fifty acres of wood, fifty acres of furze and heath, with the appurtenances, situate, lying, and being in the parish of _____, in the county aforesaid, and also all and singular the tithes of corn, grain, hay, wood, grass, wool, lambs, and calves, arising, growing, renewing, increasing, and happening within the parish of _____ aforesaid, and within the bounds, limits, and titheable places of the said rectory, to have and to hold the said tenements with the appurtenances to the said *John Doe* and his assigns, from the _____ day of _____, (*the day before that on which the demise is stated to be*) in the year aforesaid, for and during the full end and term of seven years then next ensuing, and fully to be complete and ended, by virtue of which said demise, the said *John Doe* entered into the said premises, with the appurtenances, and was possessed thereof until the said *Richard Roe* afterwards, to wit, on the _____ day of _____ (*the day after the demise*) in the _____ year aforesaid, with force and arms, &c. entered into the premises aforesaid, with the appurtenances in the possession of the said *John Doe*, and then and there ejected the said *John Doe* from the said farm, his said term therein not being yet ended, and the said *John Doe* so ejected, hath kept out, and still

No. 1.

Declaration in
ejectment by bill.

EJECTMENT; XVI. FORMS IN EJECTMENT; K. B.

doth keep him from his possession thereof, and other injuries to him then and there did, against the peace of our said lord the now king, to the damage of the said *John Doe* of £5, and therefore he brings suit, &c.

_____, attorney for plaintiff.

Pledges to prosecute

_____, attorney for defendant.

{ *John Fenn*
and
Richard Fenn.

Mr. _____ (*the tenant in possession.*)

I am informed that you are in possession of, or claim title to the premises in this declaration of ejectment mentioned, or to some part thereof, and I, being sued in this action as a casual ejector, and having no claim or title to the same premises, do advise you to appear the _____ day of _____ (*if in London and Middlesex, the first day of the term, if elsewhere, say, instead of a particular day, "in _____ term next," but where the demise is in writing be guided by the late stat. viz. 1 G. IV. c. 87. s. 1. abstracted page 530, ante*) in his majesty's court of King's Bench at Westminster, by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

(*Date.*)

Your loving friend,
Richard Roe.

No. 2.
The like by original.

(*Court.*)

(*Term.*)

Venue, to wit, *Richard Roe*, late of London, yeoman, was attached to answer *John Doe*, in a plea, wherefore, with force and arms, &c. he entered into (*here describe the premises generally, so as to comprise those claimed; the above precedent may be a general guide*), with the appurtenances, in the parish of _____, in the said county of _____, which _____ (*the lessor of the plaintiff, or person really entitled*) demised to the said *John Doe*, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said *John Doe*, and against the peace of our sovereign lord the now king, and whereupon the said *John Doe*, by _____, his attorney, complains: For that whereas the said _____ (*lessor of the plaintiff*) on the _____ day of _____ (*as to this day, see former precedent*) in the _____ year of the reign of his said majesty, at the parish aforesaid, had demised to the said *John Doe* the said tenements, with the appurtenances, to have and to hold the said tenements, with the appurtenances, to the said *John Doe* and his assigns, from the _____ day of _____ (*as to this day, see former precedent*) then last past, to the full end and term of ten years from thence next ensuing, and fully to be complete and ended, by virtue of which said demise the said *John Doe* entered into the said tenements with the appurtenances, and was possessed thereof, and the said *John Doe* being so possessed thereof, the said *Richard Roe* afterwards, to wit, on the _____ day of _____ (*as to this day, see the last precedent*) in the _____ year aforesaid, with force and arms, &c. entered into the said tenements with the appurtenances, which the said _____ (*the lessor of the plaintiff*) demised to the said *John Doe* in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *John Doe* out of his said farm, and other wrongs, &c. to the damage, &c. and against the peace, &c. whereupon the said *John Doe* saith that he is injured, and hath damage to the value of £5, and thereupon brings suit, &c.

Mr. ——— (The tenant.)

I am informed that you are in possession of, or claim title to the premises in this declaration of ejectment mentioned, or to some part thereof, and I being sued in this action as a casual ejector, and having no claim or title to the same premises, do advise you to appear the first day of next ——— term, (*the day of appearance will be governed as by bill; namely, if in London or Middlesex, the notice will be as above; if in any other county, the notice will run "next ——— term," but in case of demise having been in writing be guided by stat. 1 G. IV. c. 87. s. 1. abstracted page 530, ante*) in his majesty's court of King's Bench, wheresoever his majesty shall then be in England, by some attorney of that court, and then and there by rule of the same court to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

(Date.)

Your loving friend,

Richard Roe.

(Court.)

(Term.)

No. 3.

Declaration in ejectment by original; on a double demise.

(Venne), ———, late of ———, was attached to answer ———, of a plea, wherefore with force of arms, he entered into ——— (*here describe the premises, according to No. 1, as the case may require*), with the appurtenances, in the county of ——— aforesaid, which ——— demised to the said ———, for a term which is not yet expired, and also into ——— (*here describe the premises under the other demise*), with the appurtenances, in ——— aforesaid, in the county of ——— aforesaid, which ——— demised to the said ———, for a term which is not yet expired, and ejected the said ——— from his said several farms, and other wrongs to him did, to the great damage of the said ———, and against the peace of our sovereign lord the king, &c.; and thereupon the said ———, by ———, his attorney, complains, that whereas the said ——— (*the first-named lessor*), on the ——— day of ——— (*as to this day, see No. 1.*), in the ——— year of the reign of his present majesty, at ———, in the county aforesaid, had demised to the said ——— the said tenements first above mentioned, with the appurtenances, to have and to hold the same tenements with the appurtenances, to the said ———, and his assigns, from the ——— day of ———, then last past (*as to this day, see No. 1.*), to the full end and term of ——— years from thence next ensuing, and fully to be complete and ended, by virtue of which said demise, the said ——— entered into the same tenements with the appurtenances, and was thereof possessed, and the said ——— being so possessed thereof, the said ——— afterwards, to wit, on the said ——— day of ———, (*as to this day, see No. 1.*), in the said ——— year, with force and arms entered into the tenements first above mentioned, with the appurtenances, which the said ——— demised to the said ———, in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said ——— out of the said farm first above mentioned: And also that whereas the said ———, on the ——— day of ——— (*as to this day, see No. 1.*), in the ——— year aforesaid, at ——— aforesaid, in the county aforesaid, had demised to the said ——— the said tenements secondly above mentioned, with the appurtenances, to have and to hold the same tenements, with the appurtenances, to the said ———, and his assigns, from the ——— day of ——— (*as to this day, see No. 1.*), then last past, to the full end and term of ——— years from thence

next ensuing, and fully to be complete and ended, by virtue of which last-mentioned demise, the said _____ entered into the same tenements, with the appurtenances, and was thereof possessed; and the said _____ being so possessed thereof, the said _____ afterwards, to wit, on the said _____ day of _____ (as to this day, see No. 1.), in the said _____ year, with force and arms, entered into the said tenements lastly above mentioned, with the appurtenances, which the said _____ demised to the said _____ in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said _____ out of his said last mentioned farm, and other wrongs to him did, to the great damage of the said _____, and against the peace of our said sovereign lord the king, &c. whereupon the said _____ says he is injured, and has sustained damages to the value of £_____, and therefore he brings his suit, &c.

[For the notice see the above precedents.]

No. 4.
Declaration on a
double demise,
with two ousters.
By original, or in
C. P.

(Court.)

(Term.)

Venue, to wit, *Richard Roe*, late of _____, yeoman, was attached to answer *John Doe*, of a plea wherefore the said *Richard Roe*, with force and arms, &c. entered into _____ (the premises, as in No. 1, as the case may require), with the appurtenances, situate and being in the parish of _____, in the county of _____, which _____ (one of the lessors of the plaintiff), had demised to the said *John Doe*, for a term which is not yet expired, and ejected him from his said farm: And also, wherefore, the said *Richard Roe*, with force and arms, &c. entered into _____ other _____ (the premises as before), with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, which _____ (the other lessor of the plaintiff), had demised to the said *John Doe*, for a term which is not yet expired, and ejected him from his last mentioned farm, and other wrongs to the said *John Doe* there did, to the great damage of the said *John Doe*, and against the peace of our lord the now king, &c.; and thereupon the said *John Doe*, by _____, his attorney, complains, that whereas the said _____ (the first lessor of the plaintiff), on the _____ day of _____, (as to all the days mentioned in this form see the above forms) in the _____ year of the reign of our said lord the king, at the parish aforesaid, in the county aforesaid, had demised the said tenements first above mentioned, with the appurtenances, to the said *John Doe*, to have and to hold the same to the said *John Doe*, and his assigns, from the _____ day of _____ then last past, for and during and unto the full end and term of _____ years from thence next ensuing, and fully to be complete and ended, by virtue of which said demise, the said *John Doe* entered into the said tenements first above mentioned, with the appurtenances, and became and was possessed thereof, for the said term so to him thereof granted; and the said *John Doe* being so thereof possessed, the said *Richard Roe*, afterwards, to wit, on the _____ day of _____, in the _____ year aforesaid, with force and arms, &c. entered into the said tenements first above mentioned, with the appurtenances, which the said _____ (the first lessor of the plaintiff), had demised to the said *John Doe* in manner and for the term aforesaid, which is not yet expired, and ejected the said *John Doe* from his said farm; and also that whereas the said _____ (the same lessor), on the _____ day of _____, in the _____ year aforesaid, at the parish aforesaid, in the county aforesaid, had demised the said tenements secondly above mentioned, with the appurtenances, to the said *John Doe*, to have and to hold the same to the

said *John Doe* and his assigns, from the said — day of — then last past, for and during and unto the full end and term of — years from thence next ensuing, and fully to be complete and ended, by virtue of which said last-mentioned demise, the said *John Doe* entered into the said tenements secondly above mentioned, with the appurtenances, and became and was thereof possessed for the said last mentioned term so to him thereof granted; and the said *John Doe*, being so thereof possessed, the said *Richard Roe*, afterwards, to wit, on the said — day of —, in the — year aforesaid, with force and arms, &c. entered into said tenements secondly above mentioned, with the appurtenances, which the said — (the same lessor), had demised to the said *John Doe*, in manner and for the term last aforesaid, which is not yet expired, and ejected the said *John Doe* from his said last mentioned farm, and other wrongs to the said *John Doe* then and there did, to the great damage of the said *John Doe*, and against the peace of our said lord the now king, wherefore the said *John Doe* saith that he is injured, and hath sustained damage to the value of £—, and therefore he brings his suit, &c.

The notice to appear is similar to that in FORM No. 2, page 570, leaving out wheresoever, &c., in italic, and inserting "Common" for "King's."

In the King's Bench.

Between *John Doe*, on the demise of —, plaintiff,
and
Richard Roe, defendant.

—, of —, maketh oath and saith, that he did, on the — day of —, personally serve — and — (tenants of the premises in the declaration of ejectment herunto annexed mentioned), with the said declaration, and the notice thereunder written, by delivering a true copy [omission of the word "copy," after "true," bad, 1 *Chit. R.* 562], of the said declaration and notice to each of the said — and — (if the notice were not directed to all the tenants, say, "except that the said notice was directed to each of them the said — and —, separately,") and this deponent at the same time read over the said notice to each of the said — and —, and explained to them respectively the intent and meaning of such service (or, "this deponent at the same time explained and made known to each of the said — and —, the intent and meaning of the said declaration and notice.")

No. 5.
Affidavit of service of declaration on several tenants in one ejectment.

(Court.) (The day on which the rule issues.)
Doe, on the demise of —, Unless — (the tenant served
v. } with the declaration in ejectment,) *Roe*. }
tenant in possession of part of the premises in question, shall appear and plead to issue on —, let judgment be entered for the plaintiff against the now defendant *Roe*, by default, but execution shall issue for such parts of the premises only as are in his possession, upon the motion of Mr. —.

No. 6.
Rule for judgment against the casual ejector, K. B.

By the court.

(Court.) (Day in Term.)
Doe, on the demise of —, It is ORDERED, that —, *v.* } landlord of the tenant in possession
Roe. } of the premises in question, in this cause shall be joined and made defendant with the said tenant, if he shall appear, and the said — (the landlord), desiring if the

No. 7.
Rule where the landlord is admitted to defend, K. B.

EJECTMENT; XVI. FORMS IN EJECTMENT; K. B.

said tenant shall not appear, that he may appear by himself, and consenting, that in such case he will enter into the common rule, to confess lease, entry, and ouster, in such manner as the said tenant ought in case he had appeared (if the rule be to confess lease and entry only, it states the special terms thus: "to confess lease and entry only, without ouster, unless an actual ouster of the lessor of the plaintiff, by the said ——— (the tenant in possession), or those claiming under him, be proved at the trial,") leave is given to the said ——— (the landlord), pursuant to the late act of parliament, if the said tenant shall not appear by himself, and upon his entering into such common rule to become defendant in the stead of the casual ejector, and to defend his title to the said premises, without the said tenant, the plaintiff, nevertheless, is at liberty to sign judgment against the casual ejector, but execution thereon is stayed until the court shall further order upon the motion of Mr. ———.

By the court.

No. 8.
The like in the
C. P.

(Court.)

(Day in Term.)

Doe, on the demise of ———, } IT IS ORDERED, that ———,
v. } landlord of the premises in question,
Roe. } be joined and made defendant,
together with ———, tenant in possession of the premises in question, in the common rule, by consent in ejectment, instead of the casual ejector, in case the said ——— (the tenant in possession), shall appear: And it is further ordered, that in case the said ——— (the tenant in possession), shall neglect to appear, the said ——— (the landlord), may appear by himself, and defend his title to the premises in question, pursuant to the late act of parliament, he hereby consenting to enter into the like rule, that the said ——— (the tenant in possession), by the course of the court, in case he had appeared, ought to have been done; nevertheless, the plaintiff shall be at liberty to sign judgment against the casual ejector, but execution is hereby stayed until this court shall make further order therein: And by consent of counsel for the said ——— (the landlord), it is further ordered that the said ——— (the landlord), upon the trial to be had, shall admit himself to be in the actual possession of the said premises. On the motion of Mr. ———, for the said ——— (the landlord).

By the court.

No. 9.
Common consent
rule, K. B. before
R. M. 1 G. IV.

(Court.)

——— term, in the ——— year of the reign of king
George the fourth.

Venue. to wit, *Doe*,
on the demise of ———,
of (here describe the pre-
mises as in the declara-
tion. If many demises, say
of ——— and ———,
naming the lessors. If
the premises in the second
demise vary from those de-
scribed in the first, state
the first premises on the
first demise, and the se-
cond on the second demise,
as in the declaration; re-
member, that if part only
be defended, the consent
rule in this place may say

IT IS ORDERED, by consent of the at-
tornies of both parties, that ———,
(the tenant or his landlord, as the case
may be), be made defendant in the stead
of the now defendant, *Richard Roe*, and
do forthwith appear at the suit of the
plaintiff, and file common bail (if by
original, these words must be omitted), and
receive a declaration in an action of
trespass and ejectment for the premises
in question in this cause, and forthwith
plead thereto not guilty, and upon the
trial of the issue, confess lease, entry,
and ouster, and insist upon the title
only, otherwise let judgment be entered
for the plaintiff against the now defend-
ant, *Richard Roe*, by default: And if

what part, and add, "being part of the tenements mentioned in the declaration.")

upon the trial of the issue, the said _____ (*the tenant or his landlord, as the case may be*), shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his bill (*if by original, "his writ"*) against the said _____ (*the tenant or his landlord, as the case may be*), then no costs shall be allowed for not prosecuting the same, but the said _____ (*the tenant or his landlord, as the case may be*), shall pay costs to the plaintiff in that case to be taxed: And it is further ordered, that if, upon the trial of the said issue, a verdict should be given for the said _____ (*the tenant or his landlord, as the case may be*), or it shall happen that the plaintiff shall not further prosecute his said bill (*if by original, "writ"*), for any other cause than for not confessing lease, entry, and ouster, then the lessor of the plaintiff shall pay to the said _____ (*the tenant or his landlord, as the case may be*), his costs in that behalf to be adjudged.

By the court,
_____, attorney for the lessor of the plaintiff.
_____, attorney for the defendant.

(Court.)

_____ next after _____, in the _____ year of king George the fourth.

Venue, to wit, (title }
cause in margin as }
in No. 9.)

IT IS ORDERED, by the consent of the attorney of both parties, that _____ be made defendant in the stead of the now defendant *Richard Roe*, and do forthwith appear at the suit of the plaintiff and file common bail (*if the declaration be by original omit the words in italic*) and receive a declaration in an action of trespass and ejectment for (*if defence be for the whole omit the words in italic*) part of the premises in question, which part of the premises the said _____ hereby admits to be or consist of (*here specify for what premises defence is intended, if for the whole, state them as in declaration, if for part only state such part*) for which he intends as tenant (or landlord) to defend this action of trespass and ejectment; and it is further ordered by the like consent that the said _____ do forthwith plead Not Guilty to the said declaration and upon the trial of the issue, confess lease, entry, and ouster; and that he (*if landlord defends say, "his tenant"*) was, at the time of the service of the said declaration in possession of the premises hereinbefore mentioned and specified, and insist upon the title only, otherwise let judgment be entered for the plaintiff against the now defendant *Richard Roe*, by default; and if upon the trial of the said issue the said _____ shall not confess lease, entry, and ouster, and such possession as aforesaid, whereby the plaintiff shall not be able further to prosecute his bill (*or "writ" if by original*) against the said _____, then no costs shall be allowed for not further prosecuting the same, but the said _____ shall pay costs to the plaintiff in that case to be taxed by the master; and it is further ordered that if upon the trial of the said issue a verdict shall be given for the said _____, or it shall happen that the plaintiff shall not further prosecute his said bill (*or "writ"*) for any other cause than for not confessing lease, entry, ouster, and such possession as aforesaid, then the lessor of the plaintiff shall pay to the said _____ costs in that case to be adjudged.

By the court.

_____, attorney for the plaintiff.
_____, attorney for the defendant.

No. 10.

The like, subsequent to R. M. 1 G. IV.

No. 11.
Affidavit to
ground a motion
or summons that
the other tenant
in common be
at liberty to ap-
pear and defend,
without confes-
sing ouster.

(Court.)

(Title cause.)

A. B. of _____, in the _____, gentleman, and C. D. of _____, in the _____ of _____, severally make oath and say, and first the said A. B. on his oath saith, that he is attorney for E. F. of _____, in the _____ of _____, the landlord or person in receipt of the rents and profits of the whole of the messuage (&c.), situate (&c.), and now occupied by the said C. D. and mentioned in this declaration of ejectment: And that if the above-named G. H. (*the lessor of the plaintiff*) the lessor of the plaintiff in this ejectment hath any right or title to the same premises, or to any part thereof, the said E. F. and G. H. are entitled to the same as joint tenants, as this defendant believes: And this deponent further saith, that this ejectment is brought to recover the possession of one moiety of the said messuage (&c.), so occupied by the said C. D. and described in the declaration of ejectment as one moiety, (&c.): And deponent further saith, that he believes no actual ouster of the said G. H. hath been committed from the said premises or any part thereof. The deponent C. D. on his oath saith, that he is tenant in possession of the whole of the said messuage, (&c.) in this declaration of ejectment mentioned, and hath been such tenant for _____ years, during all which time he hath paid the whole of the rent of the same premises to the said E. F. from whom he first took the same: And the said C. D. hath not, nor hath any person to his knowledge committed, or caused any actual ouster of the said G. H. from the said premises or any part thereof.

Sworn, (&c.)

(Signed) _____

No. 12.
Notice or par-
ticular of what
is defended.

(Court.)

(Title cause.)

Take notice, that I defend for (a messuage, &c. or whatever the premises may be) situate (*where they are*) now in the possession of the said _____ (*the defendant*) or his under-tenant. Dated this _____ day of _____, 182—.

Your's, &c.

To Mr. _____, plaintiff's
attorney.

_____, defendant's attorney.

No. 13.
Consent rule,
C. P. before R.
H. 1 & 2 G. IV.

In the Common Pleas.

_____ term, in the _____ year of the reign of king
George the fourth.

Venue, to wit. John
Doe, on the demise of
_____, against Roe,
of _____, (*here insert
premises, No. 9, pa. 574,
may serve as general
instructions their for in-
sertion.*)

IT IS ORDERED, by consent of _____, attorney for the plaintiff, and _____, attorney for _____ (*the intended defend- ant*) who claims title to the tenement in question, that the said _____ (*the in- tended defendant*) shall be admitted defend- ant, and that the said _____ (*the intended defendant*) shall immediately appear by his said attorney, who shall receive a declara- tion, and plead thereto the general issue this term, and that at the trial to be had thereon, shall appear, in his proper person, or by his counsel, or attorney, and confess lease, entry, and ouster, of so much of the tenements, specified in the plaintiff's declaration, as are in pos- session of the said defendant, or his tenant, or any person claiming by, or under, his title, or that in default thereof, judgment shall be there- upon entered against the defendant, Richard Roe, the casual ejector, but proceedings shall be stayed against him until default shall be made in any of the premises, and by the like consent: It is further ordered, that if by reason of any such default, the plaintiff shall happen to be

nonsuited upon the trial, the said ——— (the intended defendant) shall take no advantage thereof, but shall thereupon pay to the plaintiff costs, to be taxed by the prothonotaries: And it is further ordered, that the lessor of the plaintiff shall be liable to the payment of costs to the said ——— (the intended defendant) by the court here to be in any manner allowed or adjudged.

By the court.

In the Common Pleas.

——— next after ———, in the ——— year of king George the fourth.

Venue, &c. (as in } IT IS ORDERED, by the consent of ———, margin of No. 13.) } attorney for the plaintiff, and ———, attorney for ———, who claims title to the premises in question (in case of part defended, say "to part of the premises in question") which premises (or "part of them") the said ——— (the now defendant) hereby admits to be, and consists of ——— (if defence be for all the premises mentioned in the declaration, describe them here as in that, if for part only specify what part) for which he intends as tenant (or landlord) to defend this action of trespass and ejectment, that he may be admitted defendant; and that the said defendant shall immediately appear by his said attorney, who shall receive a declaration, and plead thereto the general issue this term, and at the trial to be thereupon had, the said defendant shall appear in his own proper person, or by his counsel or attorney, and confess lease, entry, and ouster; and that he (or if he defend as landlord, "his tenant") was at the time of the service of the declaration, in possession of the premises hereinbefore mentioned and specified, and insist upon the title only, otherwise let judgment be entered for the plaintiff against the now defendant by default; and by the like consent it is further ordered, that if, upon the trial of the said issue the said ——— (the now defendant) shall not confess lease, entry, and ouster, and such possession as aforesaid, whereby the plaintiff shall not be able further to prosecute this action against the said ——— (the now defendant), then no costs shall be allowed for not further prosecuting the same; but the said ——— (the now defendant) shall pay costs to the plaintiff's lessor, in that case to be taxed by the prothonotaries; and it is further ordered, that if, upon the trial of the said issue a verdict shall be given for the said ——— (the now defendant) or it shall happen that the plaintiff shall not further prosecute the said action for any other cause than for not confessing lease, entry, and ouster, and such possession as aforesaid, then the lessor of the said plaintiff shall pay to the said ——— (the now defendant), costs in that case to be adjudged.

No. 14.
Consent rule,
C. P. after H.
1 & 2 G. IV.

And lastly, it is ordered, by the like consent, that in case a verdict shall pass for the plaintiff on the trial of the said issue, judgment shall be entered up thereon against the said ——— (the defendant) of the term next preceding the time of trial ("or of the session, as-sizes, or court day," as the case is) at which the trial shall be had.

No. 15.
Clause added to
consent rule
where defendant
holds over. See
statute 1 G. IV.
c. 87. s. 1.

In the Exchequer of Pleas.

(Term.)
John Doe, on the demise of ———, against ———, tenant, (or landlord.)

IT IS ORDERED, by the court, by and with the consent of both parties, their counsel and attorneys, that the aforesaid defendant, upon

No. 16.
The like in Ex-
chequer, before
R. E. 1 G. IV.

EJECTMENT; XVI. FORMS IN EJECTMENT; C. P.

the trial of the issue between the said parties, do confess lease, entry and ouster, for such lands and tenements mentioned in the declaration, as are in the possession of the said defendant (*if defence by landlord, say "of ———, tenant in possession, pursuant to an order of court for that purpose,"*) and insist upon the title only, otherwise that judgment be entered for the plaintiff against his own casual ejector, by default.

By the court.

No. 17.
The like since
same rule.

The form is the same *mutatis mutandis*, as No. 14, C. P. *ante*.

No. 18.
Præcipe for ap-
pearance, C. P.

Venue, to wit. Appearance for ———, at the suit of John Doe, on the demise of ———.
(Date.) ———, (Attorney's name.)

No. 19.
Consent rule, for
confessing lease
and entry only.

(Court.)

(Day in Term.)

*Doe v. Roe, (as in } IT IS ORDERED, by the consent of the
margin of No. 9 or 13.) }* attorneys for both parties, that ——— (*the real
defendant*) be made defendant in the stead
of the now defendant, *Roe*, and do forthwith appear at the suit of
the plaintiff, and (if by bill) file common bail, and receive a declara-
tion in an action of trespass and ejectment for the premises in
question, and forthwith plead thereto not guilty, and upon the trial of
the issue, confess lease and entry, and also ouster of the nominal
plaintiff, in case an actual ouster of the plaintiff's lessor, by the de-
fendant, shall be proved at the trial, but not otherwise, and insist
upon the title, and such actual ouster only, otherwise let judgment
be entered for the plaintiff, against the now defendant, *Roe*, by de-
fault; and if, upon the trial of the said issue, the said ——— (*the
real defendant*) shall not confess lease and entry, and also ouster,
upon the condition aforesaid, whereby the plaintiff shall not be able
further to prosecute his bill (*if by original, "his writ"*) against the said
——— (*the real defendant*) then no costs shall be allowed for not
further prosecuting the same, but the said ——— (*the real defend-
ant*) shall pay costs to the plaintiff in that case to be taxed: And it is
further ordered, that if, upon the trial of the said issue, a verdict
shall be given for the said ——— (*the real defendant*) or if it shall
happen that the plaintiff shall not further prosecute his said bill (*if by
original, "his writ"*) for any other cause than for not confessing lease
and entry, and also ouster, subject to the condition aforesaid, then
the lessor of the plaintiff shall pay to the said ——— (*the real
defendant*) costs in that case to be adjudged.

By the court.

No. 20.
Plea of general
issue in eject-
ment.

(Court.)

(Term.)

——— at the suit } And the said ——— (*the real defendant*)
of John Doe, on the } by ——— his attorney, comes and defends
demise of ———. } the force and injury when, &c. and says, that
he is not guilty of the trespass and ejectment
above laid to his charge, in manner and form as the said John hath
above thereof complained against him; and of this he the said ———,
(*the real defendant*) puts himself upon the country, &c.

No. 21.
Issue by bill.

See title ISSUE, and describe the plea "in a plea of trespass, and
ejectment of farm."

(Court.)

(Term.)

No. 22.

Venue, to wit, ———, was attached to answer *John Doe* (copy declaration, omitting *Richard Roe*, and naming instead the new or real defendant, also omit the notice.) Issue by original, K. B.; C. P.

And the said ——— (add the plea, verbatim.) And the said *John Doe* doth the like. Therefore the sheriff is commanded, that he cause to come before our lord the king ———, wheresoever our said lord the king shall then be in England, (C. P. that he cause ——— to come here) twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. *the same day is given to the parties aforesaid, &c.* (In C. P. omit the words in italic.)

George, (&c.) To the sheriff of ———, greeting: We command you that you distrain ——— (here name the jury) being the jurors summoned in our court before us at Westminster, between ———, plaintiff, and ———, defendant, by all their lands and chattels in your bailiwick, so that neither they, nor any one of them, intermeddle therewith until you shall have another precept from us, and that you answer to us out of the issues of the same, so that you have their bodies before us on ——— wheresoever we shall then be in England, to make a certain jury of the country, between the parties aforesaid, of a plea of trespass and ejectment, and to hear their judgment thereupon of many defaults; and have you then there the names of that jury and this writ. Witness, (&c.)

No. 23,
Distringas juratores, in ejectment, by original, for a trial at bar.

Venue, to wit. Be it remembered, that in ——— term last past, before our lord the king, at Westminster, came *John Doe*, by ——— his attorney, and brought into the court of our said lord the king, before the king himself, then there, his certain bill against *Richard Roe*, being in the custody of the marshal of the Marshalsea of our said lord the king, before the king himself, of a plea of trespass and ejectment, and there are pledges for the prosecution thereof, to wit, *John Denn* and *Richard Fenn*, which said bill follows in these words, that is to say, Venue, to wit. *John Doe* complains of *Richard Roe* being, &c. (go on with the declaration verbatim to the end, omit the pledges and notice; commence a new line with)

No. 24.
Entry of judgment for plaintiff by *nil dicat*, with a *remittitur damna*. By bñl.

And now at this day, that is to say, on ——— next after ———, in this same term, until which day the said *Richard Roe* had leave to impart to the said bill, and then to answer the same, &c. before our said lord the king, at Westminster, came as well the said *John Doe*, by his attorney aforesaid, as the said *Richard Roe*, in his proper person; and the said *Richard Roe* defends the force and injury when, &c. and says nothing in bar or preclusion of the said action of the said *John Doe*, whereby the said *John Doe* remains therein undefended against the said *Richard Roe*; therefore it is considered that the said *John Doe* recover against the said *Richard Roe*, his said term yet to come of and in the tenements aforesaid, with the appurtenances, and also his damages sustained by reason of the trespass and ejectment aforesaid, and hereupon the said *John Doe* freely, here in court, remits to the said *Richard Roe* all such damages, costs, and charges, as might or ought to be adjudged to the said *John Doe*, by reason of the trespass and ejectment aforesaid; therefore let the said *Richard Roe* be acquitted of those damages, costs, and charges, &c.: And hereupon the said *John Doe* prays the writ of the said lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his said term yet to come, of and in the tenements aforesaid, with the appurtenances, and it is granted to him, returnable before the said lord the king on ——— wheresoever, &c.

EJECTMENT; XVI. FORMS IN EJECTMENT; C. P.

No. 25.
The like by original.

As yet of ——— term, in the ——— year of the reign of king George the fourth. Witness, Sir Charles Abbott, knt.

Venue, to wit. *John Doe*, on the demise of ———, puts in his place ——— his attorney, against *Richard Roe*, in a plea of trespass and ejectment of farm.

Venue, to wit. The said *Richard Roe*, in person, at the suit of the said *John Doe*.

Venue, to wit. (*Here go on with the declaration verbatim to the end; omit the notice; commence a new line with*)

And the said *Richard Roe*, in his proper person, come and defends the force and injury when, &c. and says nothing in bar (*as in the last precedent by bill, to the end.*)

No. 26.
Entry of judgment for plaintiff, after verdict.

(*The entry is made as in other cases, to the end of the postea; after "say upon their oath," add*) that the said ——— (*defendant*) is guilty of the trespass and ejectment aforesaid, in manner and form as the said *John Doe* above against him complains, and they assess the damages of the said *John* by reason of the trespass and ejectment aforesaid, besides his costs and charges by him about his suit in this behalf expended to 12d. and for those costs and charges to 6d.*; therefore it is considered that the said *John Doe* do recover against the said ——— (*the defendant*) his said term yet to come of and in the tenements aforesaid, with the appurtenances, and his said damages to £——, by the jurors aforesaid in form aforesaid assessed, and also £—— for his said costs and charges by the court of our said lord the king now here adjudged of increase to the said *John Doe*, and with his assent, which said damages, costs, and charges, in the whole, amount to £——: And let the said ——— (*defendant*) be taken, &c.: And hereupon the said *John Doe* prays the writ of our said lord the king to be directed to the sheriff of the county of ——— aforesaid, to cause him to have possession of his said term yet to come of and in the tenements aforesaid, with the appurtenances, and it is granted to him, returnable before our said lord the king, on ——— wheresoever, &c.

No. 27.
The like where part is found for plaintiff, part for defendant.

(*As in the last, down to the asterisk**); therefore it is considered, that the said *John Doe* do recover against the said ——— (*the defendant*) his said term yet to come of and in the said ——— (*the premises found for him*), parcel, &c. with the appurtenances, and the damages, costs, and charges aforesaid, by the jurors aforesaid in form aforesaid assessed, and also £—— for his said costs and charges aforesaid, by the court of our said lord the king now here adjudged of increase to the said *John Doe*, and with his assent, which said damages, costs, and charges, in the whole amount to £——: And let the said *John Doe* be amerced for his false claim against the said ——— (*the defendant*) as to the residue of the tenements in the said declaration mentioned, whereof the said ——— (*the defendant*) is acquitted in form aforesaid, and the said ——— (*the defendant*) go thereof without day, &c.: And hereupon the said *John Doe* prays the writ of our said lord the king (*conclude as in the last*).

No. 28.
Precipe for original writ for the cursitor.

Venue, to wit. If *John Doe* shall make you secure, &c. then put, &c. *Richard Roe*, late of, &c. that he be before our lord the king, on ——— (*a general return*) wheresoever, &c. to shew wherefore, &c. with force and arms he entered into the premises, (*here state generally as in a declaration in ejectment*) with the appurtenances, in the parish

of _____ in the county of _____, which _____ (*the lessor of the plaintiff*) demised to him for a term which is not yet expired, and ejected, &c. and other enormities, &c. against the peace, &c. to the damage, &c.

(Date.)

_____, (*Attorney's name.*)

(Court.)

(Title cause.)

No. 29.

_____, of _____, maketh oath and saith, that this deponent did, on _____, the _____ day of _____, personally serve the above-named _____, with the rule or order for the payment of costs, on account of his not having proceeded to trial pursuant to his notice, and the master's *allocatur* on the same rule or order, and also with the consent rule and writ of *capias ad satisfaciendum*, under the seal of this honourable court hereunto annexed, by delivering unto him the said _____, true copies of the said rule or order, with the said master's *allocatur* thereon respectively, and at the same time he, the deponent, shewed the said original rule, *allocatur*, and writ of *capias ad satisfaciendum*, to the said _____, and demanded of him the payment of the sum of £_____, taxed upon the said first mentioned rule or order, and also of the further sum of £_____, being the costs adjudged to him, this deponent, on the final judgment obtained in the above action, as appears by the master's said *allocatur* on the said first-mentioned rule or order, and by the said writ of *capias ad satisfaciendum*, but the said _____ refused to pay the same or any part thereof, and the same are still wholly due and unpaid.

Affidavit to ground an attachment for non-payment of costs.

Sworn _____.

(Signed) _____.

This indenture, made the _____ day of _____, in the fifth year, (&c.) between _____ of _____, of the one part, and _____ of _____, of the other part, WITNESSETH, that the said _____, for and in consideration of the sum of 5s. of lawful money of Great Britain, to him in hand paid by the said _____ at or before the sealing and delivery of these presents, the receipt whereof the said _____ doth hereby acknowledge, HATH demised, granted, and to farm let, and by these presents DOTH demise, grant, and to farm let, unto the said _____, his executors, and administrators, all _____, situate and being in the parish of _____, in the county of _____, late in the possession of _____, but now vacant and untenanted, TO HAVE AND TO HOLD the said _____ and premises hereby demised, with the appurtenances, from the _____ day of _____ (*about the day when, but after the lessor's title accrued*) last past before the date hereof, for and during the full end and term of ten years from thence next ensuing, and fully to be complete and ended, YIELDING AND PAYING therefore yearly, and every year, during the said term, unto the said _____ or his assigns, the rent of one pepper-corn, if lawfully demanded, at the feast of _____: PROVIDED ALWAYS, and upon this condition, that if the said _____ shall at any time or times hereafter tender, or cause to be tendered to the said _____, his executors or administrators, the sum of 1s., that then, and in such case, and from thenceforth, this present indenture shall be void and of none effect (any thing herein contained to the contrary thereof in anywise notwithstanding). In witness whereof the parties hereto have interchangeably set their hands and seals, the day and year first above written.

No. 30.

A lease to be executed on the premises in case of vacant possession.

Sealed and delivered, in the presence of _____.

_____, L. S.

EJECTMENT; XVI. FORMS IN EJECTMENT; C. P.

If the lease be executed in consequence of a letter of attorney, the attestation will notice that fact, as thus:

Sealed and delivered, as the act and deed of the above-named _____, by _____, (*the person as described in the letter of attorney*) by virtue of a letter of attorney to him for that purpose made by the said _____, bearing date the _____ day of _____ instant, in the presence of _____

No. 31.

A power of attorney to enter and seal a lease in case of vacant possession.

Know all men by these presents, That I _____, of _____, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint _____, of _____, to be my true and lawful attorney for me, and in my name to enter into and take possession of _____ (*here describe the premises*) situate and being in the parish of _____, in the county of _____, but now vacant and untenanted, and after the said _____ hath taken possession thereof for me, and in my name, and as my act and deed to sign, seal, and execute a lease of the said premises, with the appurtenances, unto _____, of _____, to hold the same unto the said _____, his executors, administrators, and assigns, from the _____ day of _____ last past before the date of these presents, for the term of ten years, at the yearly rent of a pepper-corn (if lawfully demanded) subject to a proviso to make void the same on payment by me of the sum of 1s. to the said _____, his executors and administrators. In witness whereof I have, (&c.)

Witness, _____.

_____, L. S.

(Court.)

(Title cause.)

No. 32.

Affidavit of due execution of the above letter of attorney and lease, and also service of the declaration.

_____, of _____, maketh oath and saith, that he was present and did see _____, in the letter of attorney hereto annexed named, duly sign, seal, and as his act and deed deliver the said letter of attorney: And this deponent further saith, that on the _____ day of _____ last past, this deponent did see the said _____ in the letter of attorney hereto annexed named, for and in the name of _____, (*the lessor of the above-named plaintiff*) enter upon and take possession of the _____ in the lease hereto also annexed, mentioned by (*here describe any act of taking possession, as*) "by entering on the threshold of the outer door thereof, (*supposing the premises to be a messuage*) the same messuage being locked up and uninhabited," so that no other entry thereon could be made, nor any possession thereof had or taken without force: And this deponent saith, that he did, on the same day, see the above-named _____, after such entry made, and whilst he stood on the threshold of the said door, duly sign and seal the lease hereunto annexed in the name of the said _____, and as his act and deed deliver the same unto the said _____ the plaintiff above named, and that after the said lease was so executed, this deponent did see the said _____ take possession thereof by virtue of the said lease, by entering upon the threshold of the said outer door of the said messuage (*here mention any other act of taking possession*) (the same messuage being then locked up and uninhabited) so that no other entry could be had or made thereon (save as aforesaid), and that immediately afterwards the said _____, the above-named defendant, came and removed the said _____ from the said door, and put his foot on the threshold thereof, whereupon this deponent did, on the day and year aforesaid, deliver to the said defendant _____, who still continued upon the threshold of the said messuage, a true copy of the declaration of ejectment and notice thereunder written hereto annexed.

Sworn, (&c.)

(Signed) _____.

George, (&c.) To the sheriff of ———, greeting: Whereas *John Doe*, lately in our court before us by bill, without our writ and by the judgment of the same court recovered against ——— (*real defendant*) his term yet unexpired of and in ——— (*here state the premises recovered*) with the appurtenances, in ——— in your county, which ———, (*the lessor of the plaintiff*) on the ——— (*these and the following blanks must be filled up from the declaration, or see the next precedent*) day of ———, in the ——— year of our reign, demised to the said *John Doe* for a term of years which is not yet expired, that is to say, from the ——— in the said ——— year of our reign, to the full end and term of ——— years from thence next ensuing, and fully to be complete and ended. And whereas the said ——— afterwards, that is to say, on the ——— day of ———, in the ——— year of our reign, entered, with force and arms, into the messuage and tenements aforesaid, with the appurtenances, and ejected the said *John Doe* therefrom; therefore we command you, that, without delay, you cause the said *John Doe* to have his possession yet unexpired, of and in the ——— above specified, and in what manner you shall execute this our writ do you make appear to us at Westminster, on ——— (*any particular day in term*): We likewise command you, that you take the said ——— (*real defendant*) if he be found in your bailiwick, and safely keep him, so that you have his body before us at Westminster at the day aforesaid, to make satisfaction to the said *John Doe* for £——, for his damages which he has sustained, as well by reason of the trespass and ejectment aforesaid, as for his expences laid out by him about his suit in this cause, whereof the said ——— (*real defendant*) is convicted, as it appears to us on record, and have there this writ. Witness, (&c.)

No. 33.

Writ of *capias ad satisfaciendum* incorporated with the writ of *habere facias possessionem* By bill.

George, (&c.) To the sheriff of ———, greeting: Whereas *John Doe*, lately in our court before us at Westminster, by our writ (*if by bill, then say, by "bill without our writ"*), and by the judgment of the same court recovered against ——— (*real defendant*), late of ———, his term yet unexpired, of and (*here state the premises recovered*) with the appurtenances, in the parish of ——— in your county, which one ———, (*the lessor of the plaintiff*) on the ——— day of ———, in the ——— year of our reign (*the demise to be taken from the declaration*), demised to the said *John Doe* for a term of years which is not yet expired, that is to say, from the ———, day of ——— (*as mentioned in the declaration*), to the full end and term of ——— (*as mentioned in the declaration*), years then next following, and fully to be complete and ended, by virtue of which said demise the said *John Doe* entered into the said tenements, with the appurtenances, and was thereof possessed, until the said ——— (*real defendant*) afterwards, that is to say, on the ——— day of ——— (*as in the declaration*) in the said ——— year of our reign, with force and arms entered into the said tenements, with the appurtenances, in and upon the possession of the said *John Doe* thereof, and ejected the said *John Doe* from his said farm, the said term then and yet being unexpired, and did, and still doth withhold the possession of the same from the said *John Doe*, whereof the said ——— (*real defendant*) is convicted, as appears to us of record, and forasmuch as it is adjudged in our same court before us, that the said *John Doe* have execution upon his said judgment against the said ——— (*real defendant*) according to the force, form, and effect of the said recovery; therefore, we command you, that without delay, you cause the said *John Doe* to have his possession of his said term yet unexpired

No. 34.

Writ of *feri facias* for costs, incorporated with the writ of *habere facias possessionem*. By original.

of and in the said tenements, with the appurtenances, and in what manner you shall have executed this precept do you make appear to us in ——— (if by original, a general return; if by bill, a particular day) wheresoever we shall then be in England: We likewise command you, that you cause to be made £—— of the goods and chattels of the said ——— (real defendant) in your bailiwick, which were awarded to the said *John Doe* in our same court for his damages, which he sustained by reason of the said trespass and ejectment, and have you those monies before us at the same time wheresoever we shall then be in England, to render to the said *John Doe* for his damages aforesaid, whereof the said ——— (real defendant) is convicted, as appears to us of record*, and have there this writ. Witness, &c.

No. 35.
Habere facias possessionem, and also *capias ad satisfaciendum* for costs in error, on an affirmance in the House of Lords.

(Copy the last precedent down to the asterisk*, then proceed): And also £——, which in our court of parliament were adjudged to the said *John Doe* according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he had sustained and expended by reason of the delay of execution of the judgment aforesaid, on pretext of prosecuting our writ of error brought thereupon by the said ——— (real defendant) against the said *John Doe*, in the same court of parliament, the said judgment being there in all things affirmed, whereof the said ——— (real defendant) is also convicted as by the inspection of the record, and proceedings thereof remitted from our said court of parliament into our said court before us likewise appears to us of record; and have there this writ. Witness, &c.

N. For other Forms, see title *HABERE FACIAS POSSESSIONEM*.

Stat. 49 G. III.
c. 121.

ELECTION. Election to forego suit at law against a bankrupt.

See mention of this title, pages 255, 6, ante. And see stat. 5 G. IV. c. 98. s. 57. Before stat. 49 G. III. c. 121. a creditor of a bankrupt was at liberty to prove his debt under the commission, and also to proceed at law against the bankrupt; but although the creditor might have been prevented from pursuing the bankrupt and proving the debt under his commission too, yet the means of compelling the creditor to elect to abide by the result of his action, or of his proof upon the estate, were attended with delay and expensive. By s. 14, it shall not be lawful for any creditor, who has, or shall have brought any action, or instituted any suit against any bankrupt in respect of any demand which arose prior to the bankruptcy of such bankrupt, or which might have been proved as a debt under the commission of bankrupt issued against such bankrupt, to prove a debt under such commission, for any purpose whatsoever, or to have the claim of a debt entered upon the proceedings under such commission, without relinquishing such action or suit, and all benefit from the same, and that the proving or so claiming a debt under a commission of bankrupt by any creditor, shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed by him, provided always that such creditor shall not be liable to the payment to the bankrupt, or his assignees, of the costs of such action or suit which shall be so relinquished by him; and provided also, that where any such creditor shall have brought any action or suit against such bankrupt jointly with any other person or persons, his relinquishing such

action or suit against such bankrupt or bankrupts, shall not in any manner affect such action or suit against such other person or persons.

It has been held, that if a creditor have both proved his debt under a commission of bankrupt, and commenced an action against the bankrupt before the passing of this statute, that act did not compel him to relinquish his action. *Atherson v. Huddleston*, 2 *Taunt.* 181.

But where the plaintiff after an action brought, makes his election to proceed under the commission, the defendant is entitled to have some entry or suggestion of that fact put upon the record. *Kemp v. Potter*, 6 *Taunt.* 549.

Where an attorney, in order to get possession of papers belonging to A. B. in the hands of A. B.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that A. B. should enter into an unqualified reference, not revocable, &c. Held, that A. B. having become subsequently bankrupt for the second time, and without paying 15s. in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 G. III. c. 121. s. 14. so as to dispense with the reference, and that the attorney was liable pursuant to his undertaking to procure A. B.'s signature to an agreement of reference, and to find security for the performance of the award to the satisfaction of the master. *Ex parte Hughes*, 5 *B. & A.* 482.

Since this act it might seem unnecessary, except for the principle determined, to mention the case of an application for a *mandamus* to the quarter sessions, to inquire and give the benefit of an insolvent debtor's act to a prisoner, being denied. The principle on which the *mandamus* was refused, seems to have been, that no subsequent election to abandon part of the original debt for which the debtor was confined, by proving it under the commission, against the prisoner, would be allowed so to reduce that debt as to bring it within the sum and time limited by the act, and of which the prisoner would therefore be permitted to avail himself. *Ex parte John King*, 7 *T. R.* 91.

ELECTION. *Election as to legal remedy.*

Election is also used where a plaintiff, having many remedies for the same cause of action, by electing and pursuing one, precludes himself from adopting another. As to remedies.

In many cases the demandant or plaintiff may elect either to have one action or another; for in all cases where the register has two writs for the same case, the plaintiff may have one or the other. *Com. Dig. tit. Action, M. 1.*

He may sometimes have action upon the case or trespass, *ib. M. 2*; in others action upon the case or debt, *ib. M. 3*; in others, debt or covenant, *ib. M. 4*; in others, case or account, *ib. M. 5*; in others, detinue or replevin, or trespass, *ib. M. 6*; in others, trover or trespass, *ib. M. 7*; in others, action upon a statute or by common law, *ib. M. 8*; in others, he may sue in the temporal or spiritual court, *ib. M. 9*; and it is a rule, that the party applying for an information, shall be understood to have made his election and waived his remedy by action, whatever may be the fate of the

motion for the information, unless the court think fit to give him leave to bring an action, 1 *Tidd*, 9, who cites *Rex v. Sparrow and Another*, *H.* 28 G. III. K. B.

So where the plaintiff having filed a bill in equity, and arrested the defendant in C. P. for the same cause of action, had, in consequence of an order in Chancery for that purpose, elected to proceed in equity, the court refused to discharge the bail, but left them to move to set aside any proceedings which might be taken against them. *Horsley and Another v. Walstab*, 2 *Marsh.* 548. S. C. 7 *Taunt.* 235.

ELEGIT. *Writ of elegit.*

What.

This writ derives its title from its reciting, *inter alia*, that the plaintiff came into court, and by the statute in such case made and provided, chose to have delivered to him, &c.

Stat. Westm. 2.
(13 E. I.) c. 18.

By the stat. of *Westm.* 2. (13 E. I.) c. 18, when debt is recovered or acknowledged in the king's court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of *feri facias* unto the sheriff for to levy the debt of the lands and goods, or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough), and the one half of his land until the debt be levied upon a reasonable price or extent. And if he be put out of that tenement, he shall recover by a writ of *novel disseisin*, and after by a writ of *redisseisin*, if need be.

The statute thus supplies a remedy for a consee of a recognizance, or a plaintiff who had recovered judgment for debt or damages, against the land itself belonging to the defendant.

And by stat. 17 C. II. c. 7, *elegit* may be sued for damages recovered under that statute in replevin.

Caution as to
elegit formerly.

Formerly it was of importance that the plaintiff should be well assured of the beneficial grounds for entering on the roll a prayer of an *elegit* in preference to another writ of execution; for having by such entry once made his election, he could not afterwards resort to another writ of execution, 1 *Roll. Abr.* 904 (Y.) pl. 1; but then it appears that this election to bind him must have been made in the same court; for in placita 2 and 4 following that above cited, it is said, that if after an award of an *elegit* on the roll upon a judgment in C. B. such judgment was removed by writ of error into K. B. and affirmed within the year, the plaintiff might have execution by *capias* or *feri facias*, though *elegit* were sued out and returned in bank by the sheriff into C. B. *serced* before the judgment was removed into K. B. and the case was said to be still stronger if *nihil* had been returned.

Unnecessary
now, and why.

In *Foster v. Jackson*, *Hob.* 57, 58, and in several subsequent cases, it was, however, held that an award of an *elegit* on the roll should be no longer a bar to an execution by *capias ad satisfaciendum*, or *feri facias*, but only the sheriff's return that he had delivered the land according to the exigence of the writ. See also *Knowles v. Palmer*, *Cro. Eliz.* 168. *Cooper v. Langworth*, *Moor*, 545, pl. 724. It seems that the only bar [against another execution] given by the statute is for the sheriff to deliver the lands. *Palmer v. Knowllis*, 1 *Leon.* 176; for where the sheriff levies part

When a bar to
other executions,
and when not.

of the debt upon the goods of the defendant, and returns *nihil* as to the lands, the plaintiff may sue out out a *capias ad satisfaciendum* for the residue. *Bacon v. Peck*, 1 *Stra.* 226; or he may issue another *elegit*, for in that case the first *elegit* is in effect nothing else but a *feri facias*. *Foster v. Jackson*, *Hob.* 58. 1 *Rol. Abr.* 905, *pl.* 5; or he may have debt upon the judgment. *Glascock v. Morgan*, 1 *Ler.* 92; and that the defendant might be held to bail thereon, *Hesse v. Stevenson*, 1 *N.R.* 133; and it appears by the case of *Foster v. Jackson*, above cited from *Hobart*, that when a part of the debt has been levied under a *feri facias*, an *elegit* reciting the *feri facias*, and how much was levied thereon, may issue for the residue. See FORMS subjoined.

Where a *testatum elegit* is issued, it is necessary to warrant it that an *elegit* must previously be returned *nihil*. *Goodyere v. Ince*, *Cro. Jac.* 246; and where there are several writs of *elegit* awarded on the roll, writs of *elegit* only and not *testatum* writs must be issued. S. C. See also *Bro. Execution*, 72. *Testatum elegit.*

Executors or administrators of the plaintiff (or party) may issue *elegit*, but not without *scire facias*, even within the year. 2 *Inst.* 395. *Executors, &c. may issue elegit.*

It has been observed above, that only the delivering the land by the sheriff bars another execution, and the reason is said to be that when an *elegit* is extended upon the land of the defendant and returned and filed, it is considered in law as a full satisfaction and end of the suit; insomuch that if the land were afterwards evicted, the tenant by *elegit* was formerly not entitled to a re-extent, but only to a writ of *novel disseisin* or *re-disseisin*, given by the statute of Westminster, for the law reputes him satisfied. *Crawley v. Lidgate*, *Cro. Jac.* 338. But now by stat. 32 H. VIII. c. 5. which Sir Edward Coke calls "a profitable statute," if lands, &c. delivered in execution on a judgment-statute or recognizance shall be evicted without fraud or default of the tenant who holds them in execution before the debt and damages are wholly levied, the recoveror or conusee may have a *scire facias* out of the same court from whence the execution did proceed against the person on whom the execution was first sued, his heirs, executors, or assigns of lands then liable to the execution, returnable in the same court 40 days after the date of the *scire facias*, and if the defendant make default, or shews not cause, the chancellor or justices of the court where the *scire facias* is returned, shall make a new writ of the like nature of the former execution for levying the residue of the debt. *Scire facias after eviction.*

It may be observed that the benefit of this statute seems to limit the *scire facias* to the recoveror or the conusee, but it is noted that though "executors, administrators, or assigns" are omitted in this material place, "yet by a benign interpretation this statute shall extend to them," and that the remedy must by construction be extended to all the persons that appear by the act to be grieved. *Co. Litt.* 290. a. And though the statute give a *scire facias* out of the same court, yet if the record be removed by error into another court, and affirmed there, the tenant by execution who is evicted shall have a *scire facias* by the equity of the statute out of that court, because the *scire facias* must be grounded on the record, *Executors, &c. within this statute.*

Where *scire facias* may issue out of another court.

Where after eviction from part, tenant must be content with the remainder.

For how long plaintiff may rule the lands.

Plaintiff has only a chattel interest.

Whether *elegit* may be issued after a year without *scire facias*.

It may issue after the defendant's death in execution.
Interest may be levied under an *elegit*.
What may or not be extended under an *elegit*.

ib. But if part of the land, &c. even if all be evicted, saving one acre, the tenant by execution must be contented to hold that, though it be but a poor remedy: for no new execution in that case can he have upon this statute. *Co. Lit.* 289, *b.* *Crawley v. Lidgeat, Cro. Jac.* 338; for where the tenant by execution hath remedy given to him by law after eviction, there the statute extendeth not to it. *Fulwood's Case, 4 Rep.* 66, *a.*

On the delivery of the moiety of the defendant's lands, the plaintiff is to hold the same until his whole debt or damages are paid and satisfied, and during that term he is tenant by *elegit*. *Co. Lit.* 289.

But though the words of the writ are "to hold as his freehold," yet the plaintiff or tenant by *elegit* has only a chattel and no freehold. *2 Inst.* 396.

Notwithstanding the case of *Seymour v. Greenville, Carth.* 283, which, if the report be to be credited, was adjudged with consideration, and the precedents to be found in *Clift.* 874 and 883, it might seem questionable whether an *elegit* or some other writ of execution ought not to be sued out within the year, and returned and filed to warrant the entry of the continuance. *Williams's Saund.* 68, *d. n.* 4th edit. See *Blayer v. Baldwin, 2 Wils.* 82; but this case and others mentioned by the learned serjeant apply to other writs of execution, and not to *elegit*: it therefore becomes discretionary with the practitioner whether to rely on *Carthew* or rather on the precedents in *Clift*, or to issue *scire facias* where the judgment is of more than a year standing. The great learning of Mr. Serjeant Williams may entitle his doubts upon this question to the highest consideration, and the more especially so as the issuing a *scire facias* can little prejudice the plaintiff; while such issue would be quite analogous with the rule of practice which requires that in continuing a writ, it is the constant course to shew that it has been returned and filed.

But *7 Mod.* 64, *Co. Lit.* 290, *2 Show.* 235, may be cited to shew that *scire facias* need not issue.

If the defendant in debt die in execution, the plaintiff shall have a new *elegit* afterward. *5 Rep.* 87.

It seems that in equity, interest beyond the penalty of the judgment would be allowed to be recovered. *Godfrey v. Watson, 3 Atk.* 517, 18.

The statute will have pointed out the effect of the writ as to lands generally, and the previous observations supported by the several authorities quoted, will have sufficiently shewn the nature of the writ and who the parties are that may issue it, and what may be levied under it. A few cases may be stated to shew what may or may not be extended under *elegit*.

A rent or a rent-charge, *Wootton v. Shirt, Cro. Eliz.* 742. *Bro. Elegit*, 13. *Moor*, 32. A term for years, *2 Inst.* 395. *Fleetwood's Case, 8 Rep.* 171, *a.* *Dalt. Sher.* 137. Lands in ancient demesne, *Cox v. Barnsly, Hob.* 47. Lands before in execution upon a statute, *Fulwood's Case, 4 Co.* 64. Lands in the hands of trustees for debt contracted by *cestui que trusts*, *25 C. II. c. 3. s. 10.* Lands of a bishop, *Dalt. Sher.* 136. And also the wife's lands which the husband has during the coverture, *ib.* Also re-

versions on leases for lives or years, 1 *Roll. Abr. (B.)* 894, *pl.* 5. Bishop of Bristowe's Case, 3 *Leon.* 113. *Moor.* 36. And all lands (i. e. a moiety) which the conusor or defendant was seised of at the time of the judgment or recognizance, or after, 2 *Inst.* 395. *Dalt. Sher.* 134.

Copyhold lands are not extendible under an *elegit*. Heydon's What. Case, 3 *Rep.* 9. 1 *Roll. Abr.* 888. (*M.*) *pl.* 2.

Although if an inquisition comprehend both freehold and copyhold, it may, although bad for the copyhold, be good for the freehold. *Morris v. Jones*, 3 *D. & R.* 603. Where good for part.

Nor an advowson in gross. *Gilb. Execution*, 39; but see 3 *P. Williams*, 401. Nor of the glebe belonging to the parsonage or vicarage, nor of the church-yard. *Ib.* 40.

No notice of executing the writ appears necessary to be given. 2 *Williams's Saund.* 69. *a. n.* 2. 1 *Crompt.* 363.

The word "price," mentioned in the statute, is referable to the defendant's goods and chattels, and extend to the defendant's lands. 4 *Rep.* 74. *b.* *Palmer's Case*, 2 *Inst.* 396. And the sheriff must take an inquisition through the medium of a jury. *Dalt. Sher.* 134. who cites *Semayne's Case*, *Co.* 5. 91. and the sheriff and jurors may go into the house or ground if the doors or gates be open, but may not break open the gates or doors, &c. *Ib.* Cases as to the execution of the writ.

On this writ it will be seen, that either the goods or a moiety of the land of the defendant may be delivered; but where the goods only are delivered, the *elegit* is only so far considered as a *ieri facias*. The following cases and observations apply to the *elegit* issued with a view to extend the defendant's lands; but if it appear to the sheriff, that there are goods and chattels of the debtor's sufficient to satisfy the debt he ought not to extend the lands. 2 *Inst.* 395.

The inquisition ought to find the lands with convenient certainty; for to find no certain estate will be insufficient. *Moor.* 8, *pl.* 28; and after the inquisition is taken, the sheriff must deliver a moiety by metes and bounds. *Dalt. Sher.* 135, *Anon.* 1 *Vent.* 259. *Den d. Taylor v. Lord Abingdon*, 2 *Doug.* 473, and if he do not, the inquisition is voidable, according to *Pullen v. Birkbeak*, *Carth.* 453. but a nullity according to *S. C.* 1 *Ld. Raym.* 718. 1 *Sid.* 91, *pl.* 12. upon ejectment *S. C.* reported under the name of *Putten v. Purbeck*, 2 *Salk.* 563. *Fenny v. Durrant*, 1 *B. & A.* 40, *S. P.* In this case the sheriff returned that he had delivered an equal moiety of a house, but without setting out such moiety by metes and bounds.

It seems that the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making in value a moiety of the whole. *Den d. Taylor v. Earl of Abingdon*, 2 *Doug.* 473; and the case of *Count de Stamford v. Nedham*, 1 *Lev.* 160. was denied to be law. This last case was where the defendant had 20 acres in *D.* and 20 acres in *S.* and the sheriff had delivered the 20 acres in *S.* for the moiety of the whole, and it was ruled that the moiety of the 20 acres in each ville ought to have been delivered. But one of two manors may be delivered where they are of equal value. *Bro. Abr. Elegit*, 14. But if the sheriff deliver more than a moiety of the lands, the *elegit* is void of

titled may enter; i. e. bring ejectment without scire facias. 2 Williams's Saund. 72 u.

How to sue out
elegit, &c.

The writ of elegit is to be engrossed on parchment; indorse sum to be levied besides, &c. it is signed by the signer of the writs King's Bench Office; pay 1s. 8d. and sealed; pay 7d. For precipe, see No. 2, FORMS subjoined. A warrant is obtained at the sheriff's office; pay 2s. 4d. Sheriff's fee, 12d. in the pound for the first £100, on the yearly value delivered; and 6d. in the pound for the excess above that sum.

PRACTICAL DIRECTIONS, C. P.

The foregoing cases and directions equally apply to this court, as also the FORMS subjoined, mutatis mutandis, which see.

The writ is to be signed by the prothonotary; pay 1s. 4d.; seal 7d.

FORMS.

No. 1.
Award of a writ
of elegit on the
roll, K. B.

Afterwards, that is to say, on _____ next after _____ (the teste of the elegit) then next ensuing before our lord the king, at Westminster, the said _____ came by his attorney aforesaid, and according to the form of the statute in such case made and provided, elected to be delivered to him all the goods and chattels of the said _____, except the oxen and beasts of his plough; and also a moiety of all the lands and tenements of the said _____ of which the said _____ was seized, on _____ on which day the said judgment was given, or at any time afterwards, to hold the said goods and chattels at his own proper goods and chattels, and also to hold the said moiety of all the said lands and tenements as his freehold to him and his assigns, by a reasonable price and extent, according to the form of the said statute, until he shall have fully levied thereof the debt and damages aforesaid. And the said _____ prays a writ of our lord the king to be directed to the sheriff of the said county of _____ in manner aforesaid, and it is granted him returnable before our lord the king at Westminster, on _____ next after _____, the same day is given to the said _____ at the same place. At which day before our lord the king at Westminster, the said _____ came by his attorney aforesaid, and the sheriff of the said county of _____, namely _____, by virtue of the said writ to him directed, returned a certain inquisition taken before him, at _____, in the county aforesaid, on _____; the _____ day of _____, in the _____ year of the reign of king George the fourth aforesaid, by the oath of twelve honest and lawful men of his bailiwick, which said inquisition follows in these words, to wit, (*here copy the inquisition.*)

No. 2.
Precipe for an
elegit.

Venue, to wit. Elegit for _____ against _____ for £ — debt and _____ damages (or case in promises) returnable on _____ (Date.) _____, (Plaintiff's attorney.)

No. 3.
Elegit in debt in
K. B. or C. P.

George, (&c.) To the sheriff of _____, greeting: Whereas _____, lately in our court before us, (in C. P. say "before our justices,") at Westminster, by the consideration of the said court recovered against _____, late of _____ (in K. B. leave out late of _____) as well a certain debt of £ _____ as _____ shillings, which in our said court were adjudged to the said _____, for his damages, which he had sustained by occasion of the detaining the said debt, whereof the said _____ is convicted; as appears to us

of record,* and because the said ——— afterwards came into our said court before us, and according to the form of the statute in that case made and provided, chose to have delivered to him all the goods and chattels of the said ——— except his oxen and the beasts of his plough, and also a moiety of all his lands and tenements in your bailiwick, to hold to him the goods and chattels aforesaid, as his own proper goods and chattels, and also to hold the said moiety as his freehold to him and his assigns, according to the form of the said statute, until the said debt and damages (*if in case say "damages,"*) shall be thereof levied. And, therefore, we command you that you cause to be delivered to the said ———, by a reasonable price and extent, all the said goods and chattels of the said ——— except the oxen and beasts of his plough, and also a moiety of all his lands and tenements in your bailiwick, whereof the said ———, on ———, in the ——— year of our reign, on which day the said judgment was given, or at any time after was seised. To hold to the said ——— the said goods and chattels as his own proper goods and chattels, and to hold the said moiety as his freehold to him and his assigns, according to the form of the said statute until the debt and damages (*if in case say "damages"*) aforesaid, shall be thereof levied. And in what manner you shall have executed this our writ make appear to us (C. P. *say "to our justices"*) at Westminster, on ——— (C. P. *general return*) under your seal and the seals of them by whose oath you shall make the said extent and appraisement, and have then there (C. P. *leave out "then"*) this writ. Witness, (*the name and stile of the chief justice of the court, as the case is,*) at Westminster, the ——— day of ———, in the ——— year of our reign.

George, (&c.) To the sheriff of ———, greeting: Whereas ———, lately in our court, before us at Westminster, by bill without our writ, and by the consideration and judgment of the same court, recovered against ———, £—— which in our said court before us were adjudged to the said ——— as well for his damages, which he had sustained by means of the non-performance of certain promises and undertakings, made by the said ——— to the said ———, as for his costs and charges by him about his suit in that behalf expended, whereof the said ——— is convicted, as appears to us of record. And because, (*go on from the asterisk in No. 3.*)

No. 4.

Elegit in case, K. B.

George, (&c.) To the sheriff of ———, greeting: Whereas ———, lately in our court, before our justices at Westminster, by the consideration of the said court recovered against ———, late of ——— £—— which in our said court were adjudged to the said ——— for his damages, which he had sustained by occasion of a certain trespass done to the said ——— by the said ———, with force and arms against our peace, at ———, in your county, whereof the said ——— is convicted, and because the said ——— afterwards came into our court. (*Go on from the asterisk No. 3. Use the word "damages," instead of "debt and damages."*)

No. 5.

Elegit in trespass, C. P.

George, (&c.) To the sheriff of ———, greeting: Whereas ———, lately in our court, before us by bill, without our writ, and by the judgment of the said court, hath recovered against ———, £—— of debt, and also £—— for the damages of the said ——— which he had sustained as well by occasion of the detaining of that debt as for his costs and charges which he hath been put to about his suit in that

No. 6.

Elegit or re-elegit after an elegit on discovery of more lands, &c. In debt.

behalf, whereof the said _____ is convicted as appears to us of record. And because the said _____ came into our court before us, and hath elected to have delivered to him all the goods and chattels of the said _____, except his oxen and beasts of his plough, to hold the said goods and chattels to him as his own proper goods and chattels, and likewise a moiety of all and singular the lands and tenements of the said _____ within your bailiwick, to hold to him and his assigns (as their own freehold) according to the form of the statute thereupon made and provided, until the debt and damages aforesaid should be thereof fully levied, therefore we commanded you that you should cause to be delivered to the said _____ without delay by a reasonable price and extent, all the goods and chattels of the said _____ in your bailiwick, except his oxen and beasts of his plough, and likewise a moiety of all the lands and tenements of the said _____ within your bailiwick, whereof the said _____ was seised on the _____ day of _____, in the _____ year of our reign, on which day the aforesaid judgment was rendered, or at any time afterwards, to hold the said goods and chattels to him as his own proper goods and chattels, and also to hold the moiety of the lands aforesaid as his own freehold, according to the form of the said statute, until he should have thereof levied the debt and damages aforesaid. And in what manner you should have executed that our writ, you were to make known to us at Westminster, at a certain day now past, under your seal and the seals of those by whose oath you should have made that extent and appraisement; and you at that day returned to us an inquisition taken before you, at _____ on _____ the _____ day of _____ last past, by the oath of twelve honest and lawful men of your bailiwick, whereby it appears that the said _____ was seised in his demesne as of fee, at the time of the recovery of the debt aforesaid, of (*here specify the lands as returned by the inquisition.*) And the said _____ hath humbly represented to us that the said _____ at the time of rendering the judgment aforesaid, and afterwards had and now hath divers other lands and tenements besides those specified in the return aforesaid, the moiety of which said other lands and tenements ought also to be had in execution for the speedier recovering of the said debt, and hath also besought us, that he may so have them delivered to him according to law, therefore we command you, that, in the presence of the said _____ to be thereunto summoned, if to be there he be willing, you cause to be delivered to the said _____ by a reasonable price and extent, as well the other moiety of all and singular the said other lands and tenements of the said _____ as of those whereof the moiety is already extended in execution for payment of the aforesaid debt, being within your bailiwick; to hold the same to the said _____ and his assigns, as his own freehold, until the aforesaid £_____ shall be fully levied, and whatsoever you shall do therein, make known to us at Westminster, on _____ next after _____, under your seal and the seals of those by whose oath you shall make that extent and appraisement, and that you there send the same, together with this writ. Witness, _____.

No. 7. George, (&c.) To the sheriff of _____, greeting: Whereas _____, lately in our court, before our justices at Westminster, by the consideration of the same court recovered, (*copy No. 3, to the words "is convicted,"*) and whereupon by our writ, we lately commanded you, that of the goods and chattels (*here recite the writ of fieri facias.*) And you at that day returned (*here recite the return.*)

Elegit for the residue after a levy under a writ of fieri facias, C. P.

And afterwards the said ——— came into our said court before our said justices, and chose to have delivered to him all the goods and chattels of the said ——— in your bailiwick, except the oxen and beasts of his plough, to hold the said goods and chattels as his own proper goods and chattels, and also a moiety of all the lands and tenements of the said ——— in your bailiwick, by a reasonable price and extent, to hold to him and his assigns, according to the form of the statute in such case made and provided, until £—— residue of the damages aforesaid, should be thereof fully levied, therefore we command you (*here follow No. 3, from the words "command you," down to the words "according to the form of the statute aforesaid"*) until the said £——, residue of the damages aforesaid, shall be thereof fully levied. And in what manner you shall have executed this our writ. (*Conclude as in precedent No. 3.*)

George, (&c.) To the sheriff of ———, greeting: Whereas No. 8.
lately in our court, before our justices at Westminster, it was con- *Elegit after sci.*
sidered that ——— have execution against ———, by the de- *fa. C. P.*
fault of the said ———, as well a certain debt of £——,
which the said ———, in our court before our justices at Westmin-
ster recovered against the said ———, as also £—— which in
our said court were adjudged to the said ——— for his damages
which he had by occasion of detaining that debt whereof the said
—— is convicted; and the said ——— afterwards came, (*as*
in No. 3, ante.)

It appears by the following precedent, that formerly, the *sci.*
fa. was not recited in the *elegit*, where it was brought at the
instance of an executor.

George, (&c.) To the sheriff of ———, greeting: Whereas No. 9.
——, executor of the last will and testament of ———, de- *Elegit on a judg-*
ceased, lately in our court before our justices at Westminster, by the *ment after sci.*
consideration of the same court recovered against ———, late of *fa. brought by an*
——, £—— which in our same court, before our said jus- *executor, C. P.*
tices at Westminster aforesaid, were adjudged to the said ———,
according to the form of the statute in that case made and provided
by the default of the said ———, for the damages of the said
——, which he had sustained, by occasion of the not performing
certain promises and undertakings, made by the said ——— to the
said ——— in his life-time, whereof the said ——— is con-
victed; and the said ——— afterwards came into our same court,
and chose to have delivered to him all the goods and chattels of the
said ———, except the oxen and beasts of his plough; and likewise
a moiety of all his lands and tenements in your bailiwick, to hold
to the said ——— the goods and chattels aforesaid as his own
proper goods and chattels, and also to hold the said moiety of
the said lands and tenements as his own freehold, to the said ———
and his assigns, according to the form of the statute aforesaid, until
the damages aforesaid be thereof levied: And therefore we command
you, that without delay you deliver to the said ———, by a
reasonable price and extent, all the goods and chattels of the said
——, except the oxen and beasts of his plough; and also the
moiety of his lands and tenements in your bailiwick, of which the
said ——— was seised on ———, in the ——— year of our
reign, on which day judgment was thereof given, or at any time
afterwards, to hold to the said ——— the said goods and chattels
as his own proper goods and chattels, and to hold the said moiety as

his freehold to the said ——— and his assigns, according to the form of the statute aforesaid, until the damages aforesaid shall be thereof levied: and in what manner you shall execute this our writ, make appear to our justices at Westminster aforesaid, on ———, under your seal, and the seals of them by whose oath you shall make the extent and appraisement thereof; and have you there this writ. Witness, ———.

The following precedent seems preferable.

No. 10.
*Elegit in debt
after a scire fa-
cias, K. B.*

George, (&c.) To the sheriff of ———, greeting: Whereas ——— lately in our court, before us at Westminster, by bill, without our writ, and by the judgment of the same court, recovered against ———, £——— and also £——— for his damages which he had sustained as well by reason of the detention of that debt, as for his costs and charges, by him about his suit, in that behalf expended, whereof the same ——— is convicted, as appears to us of record, and whereof in our court before us at Westminster, it is considered that the said ——— may have his execution against the said ——— for the debt and damages aforesaid, by the default of the said ———, &c. And because the said ——— hath come into our said court, and chose to have delivered to him all the goods and chattels of the said ———, saving only his oxen and beasts of his plough, and likewise the one half of all the lands and tenements of the said ——— in your bailiwick, to hold to him the goods and chattels aforesaid as his own goods and chattels; and also to hold the one half aforesaid, to him and his assigns as his freehold, according to the form of the statute in such case made and provided, until he shall have thereout fully levied the debt and damages aforesaid; therefore we command you, that you without delay cause to be delivered to the said ——— all the goods and chattels of the said ——— in your bailiwick, saving only his oxen and beasts of his plough; and also the one half of all the lands and tenements of the said ——— in your bailiwick, whereof the said ———, and any person and persons in trust for the said ———, on ——— next after ———, in the ——— year of our reign, on which day the judgment aforesaid was given, or ever after was or were seised, upon a reasonable price and extent, to hold to him the goods and chattels aforesaid as his own goods and chattels, and also to hold the one half of the lands and tenements aforesaid to him and his assigns, as his freehold, according to the form of the statute aforesaid, until the debt and damages aforesaid shall thereout be fully levied: and in what manner you shall have executed this writ, make appear to us at Westminster, on next after ——— under your seal, and the seals of those, by whose oath you shall make that extent and appraisement, together with this writ. Witness, ———.

No. 11.
*Inquisition on an
elegit, where a
lease for lives is
found, and land
also.*

(Venus) to wit. An inquisition indented, taken at ———, in the county aforesaid, on the ——— day of ———, in the ——— year of the reign of king George the fourth, before me, ———, sheriff of the county aforesaid, by virtue of the writ of the said lord the king to me directed, and to this inquisition annexed, by the oath of ——— good and lawful men of the county aforesaid, who being sworn and charged, say, on their oath, that ———, in the writ to this inquisition annexed, named, on the day of the caption of this inquisition, was possessed of the residue of the term of ——— years then to come, if ——— and ———, and ———, or any of them should so long live, which said term was

granted by one _____ to the said _____, his executors, administrators, and assigns, for the term aforesaid, by indenture bearing date the _____ day of _____, in the _____ year of the reign of the lord the now king, to hold from _____ for the term aforesaid, (the said _____ and _____ at the said time of the caption of this inquisition being in full life) and of and in one messuage with the appurtenances, one close called _____, one other close called, (&c.) in my county, now, or late in the tenure or possession of the said _____, or his tenants, the estate, interest, and term of which said _____ in the tenements aforesaid, the jurors aforesaid have on their oath aforesaid appraised to £_____, which said term I the said sheriff have caused to be delivered to the said _____, to hold to him as his own proper goods and chattels, in part of satisfaction of his debt, in the writ aforesaid mentioned. And the jurors aforesaid on their oath aforesaid, likewise say, that the said _____ at the time of giving of the judgment in the same writ mentioned, to wit, from the _____ in the writ aforesaid mentioned, was seised in his demesne as of fee of and in _____ with the appurtenances, containing by estimation _____ acres, situate, lying, and being in _____ aforesaid, in the county aforesaid, now, or late in the tenure or possession of _____, or his assigns, of the clear yearly value in all issues, besides reprises of £_____, and of and in one other _____, with the appurtenances, called _____, containing by estimation _____ acres, situate, lying, and being in _____ aforesaid, in the county aforesaid, and now or late in the tenure, or _____ (as before) And the jurors aforesaid, on their oath aforesaid, further say, that the said _____ and the said _____ are a true and equal half of all and singular the lands, tenements, and hereditaments whatever of the said defendant, in the writ aforesaid named, in my county, which said half, I the said sheriff, on the day of the caption of this inquisition, upon the reasonable price and extent aforesaid, have caused to be delivered to the said _____, in the writ aforesaid named, to hold to him and his assigns as his freehold according to the form of the statute in such case made and provided, until the residue of the said debt and damages shall thereout be fully levied. And the jurors aforesaid, on their oath aforesaid, further say, that the said _____, in the writ aforesaid named, had not, on the day of the caption of this inquisition, any other or more goods or chattels in my bailiwick, nor at the time of giving the judgment aforesaid in the writ aforesaid mentioned, nor at any time after, hitherto, had any other, or more lands or tenements in my county. In witness whereof, _____.

Afterwards, to wit, on _____ next after _____ comes the said _____ in his proper person, and according to the form of the statute in such case made and provided, chuses to have delivered to him all the goods and chattels of the said _____ and _____ saving only their oxen and beasts of their plough, and also one half of all the lands and tenements of the said _____ and _____ in the county of _____, of which the same _____ and _____, on _____, in the _____ year of our reign, on which day the judgment aforesaid in the writ of *scire facias* aforesaid mentioned was given, or ever after were, or either of them was seised, on a reasonable price and extent, to hold to him the goods and chattels aforesaid as his own proper goods and chattels, and to hold the one half aforesaid to him and his assigns as his freehold; according to the form of the statute aforesaid, until the debt and damages shall be thereout

No. 12.

The entry of an *elegit* against two defendants after judgment on *scire facias*; with continuances.

fully levied, and the same _____ prays the writ of our lord the now king to be thereupon directed to the sheriff of the county of _____, and it is granted returnable before the lord the king at Westminster on _____ next after _____, the same day is given to the said _____ there, &c. On which day, before the lord the king at Westminster, comes the said _____ in his proper person, and the said sheriff of the county of _____ hath not returned the writ aforesaid nor done any thing therein, and upon this the said _____ prays another writ of the said lord the king to the same sheriff of the county of _____ in form aforesaid to be directed, and it is granted, &c. returnable before the said lord the king at Westminster on _____ next after _____, the same day is given to the said _____, there, &c. On which day, before the said lord the king at Westminster comes the said _____ in his proper person, and the said sheriff of the county of _____ hath not returned the writ aforesaid, nor done any thing therein; and upon this the said _____ prays another writ of the said lord the king to the same sheriff of the county of _____ in form aforesaid to be directed, and it is granted, &c. returnable before the said lord the king at Westminster on _____ next after _____, the same day is given to the said _____ there, &c. On which day before the said lord the king at Westminster comes the said _____ in his proper person, and the said sheriff of the said county of _____, to wit, _____, by virtue of the said last-mentioned writ to him directed, returns that the said _____ had no goods or chattels in his bailiwick whereof he could cause to be levied the debt and damages aforesaid or any part thereof, and that the said _____ on _____ next after _____, in the _____ year of the reign of the said lord the king aforesaid, being the day of the giving of the judgment aforesaid, or ever after had no lands or tenements in his bailiwick whereof he could cause to be levied the debt and damages aforesaid, or any part thereof. And the same sheriff farther returns a certain inquisition taken before him at _____, in the county of _____, on the _____ day of _____, in the _____ year of the reign of the lord the king aforesaid, which said inquisition follows in these words, to wit, An inquisition indented, taken, (&c).

Who,

ELISORS. "If the plaintiffe alledge a cause of challenge against the sheriffe, the processe shall be directed to the coroners; if any cause against any of the coroners, processe shall be awarded to the rest; if against all of them, then the court shall appoint certain *elisors* or *esliors*, (so named *ab eligendo*.) because they are named by the court, against whose returne no challenge shall be taken to the array because they were appointed by the court; but he may have his challenge to the polles." *Co. Lit.* 158, a.

As it appears that *elisors* are named by the court, that is, by the master K. B. or prothonotary C. P. if on the civil side; and by the master of the crown office if on the crown side; a special application must of course be made for that purpose. *Holland v. Heron, Bar.* 465. See title ATTACHMENT against Sheriff, K. B. page 106.

If the sheriff be interested, the writ is directed to the coroner; he being interested, it must be directed to *elisors*. *Grant v. Bragge, 3 East*, 141.

A special suggestion must be made on the award of the *venire*. See FORMS subjoined to title VENIRE.

PRACTICAL DIRECTIONS.

In the case cited from Barnes, ante, 598, it appears there were two rules. The first was to shew cause why it should not be referred to the prothonotary to consider of two fit persons to be elisors; and to report: which rule being made absolute without opposition, and the prothonotary having named them accordingly, the next rule was to shew cause why they should not be appointed elisors by the court; which rule was also made absolute without opposition.

ELY. See title **DIRECTION OF WRITS.**

A writ of *feri facias* directed in the first instance to the bailiff of the Isle of Ely out of K. B. is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution. The Bishop of Ely has not a palatinate jurisdiction within the isle, though exercising *jura regalia* [rights of royalty] there. Process issued out of the courts at Westminster into the isle goes in the first instance to the sheriff of Cambridgeshire, who thereupon issues his mandate to the bailiff of the franchise. *Grant v. Bragge*, 3 *East*, 128. And *certiorari* lies to remove a cause from the court of the Isle of Ely, 1 *Tidd*, 400, where, amongst other cases anterior in time, *Williams v. Thomas*, 22 G. III. K. B. is cited from *Doug.* 751. See title **CONUSANCE.**

In C. P. the writ, when directed to the Court of Pleas of the Bishop of Ely, is, previously to sealing it, indorsed "Isle of Ely." *R. E.* 13 *W.* III. C. P. And see 3 *East*, 728. *Id.*

ENGROSSMENT. *Engrossment of pleadings.*

It seems that engrossments must be fair and without obliterations of printed counts. *Hartop v. Jukes*, gent, one, &c. 1 *M. & S.* 709. And copy ejectment served cannot be written on both sides of the paper. See title **EJECTMENT**, *ante*. Yet it should seem, that since the repeal of the statutes imposing stamps on legal proceedings, no objection can be taken to engrossments fairly on both sides the paper.

ENLARGED RULE. See title **RULE.**

ENTERING ISSUE. See title **ISSUE**, *Entering issue.*

ENTERING CAUSE FOR TRIAL. No cause can be tried unless the same be duly entered, or set down in the list or paper of the Chief Justice, which contains the names of the causes to be tried; and there are particular days and times for this entry, both as to town and as to country causes. The rules respecting this entry of the cause will best explain the practice.

AS TO TOWN CAUSES, K. B.

By *R. G. H.* 34 G. III. all causes to be tried at the sittings after term shall be entered, and the records to be delivered to the marshal at the times following: the causes in Middlesex the first day of the sitting after term in Middlesex, and the causes for London two days before the adjournment day in London. R.G.H. 34 G. III.

By *R. G. H.* 44 G. III. in future no cause shall be tried by a special jury in Middlesex or London, unless the rule for such special jury be served, and the cause marked in the marshal's book, as a special jury cause, on or before the day preceding the adjournment day in Middlesex and London respectively. *Peake's* Of special jury causes. R. G. H. 44 G. III.

ENTERING CAUSE; Pt. Di. K. B.

Rules & Orders, K. B. N. B. This or a similar rule is said by Mr. *Impey* to have been made long before, viz. T. 3 G. III.

The cause, it is said, must be entered by nine in the evening.

By R. G. M. 4 *Anne*, if the defendant in an action in London or Middlesex, and to be tried at the sittings of the L. C. J. shall enter a *ne recipiatur*, and by reason thereof hinder the plaintiff that he cannot proceed at that sitting; that then it shall be lawful to the said plaintiff to proceed to trial in the said cause, at the next sitting of the said C. J. after the entering of the said *ne recipiatur* upon notice given during the said first sittings.

By R. G. M. 17 G. II. every cause to be tried at *nisi prius* in London and Middlesex, be tried in the order in which it is entered (beginning with remanets,) unless it shall be made out to the satisfaction of the judge of *nisi prius* in open court, that there is a reasonable cause to the contrary, who thereupon will make such order for the trial of the cause so to be put off as to him shall seem just.

When *ne recipiatur* may be entered.

A *ne recipiatur* cannot be entered until after proclamation made by order of the lord chief justice for bringing in the records. See PRACTICAL DIRECTIONS, *post*.

PRACTICAL DIRECTIONS, K. B.

A slip of paper, on which is written the short title of the cause, is to be delivered to the marshal, who attends at the chambers of the chief justice for that purpose, and in the order in which they are received the marshal sets them down in his book accordingly. Pay him 11s. 8d. and at the same time the record, duly passed, with the venire and distringas, is left with him.

If the cause be to be tried at the sittings, the same must be set down two days exclusive before the day of such sitting.

If in Middlesex, the case must be entered the first day at the sitting after term.

If in London, it must be entered two days before the adjournment day in London.

In the entry of a cause for the adjournment day in London, or for the sittings after term in Middlesex, considerable patience and some address were accustomed to be exerted to procure that entry to be made as late as possible, in order to give the latest time for the preparation and delivery of the briefs before actual trial; a step which is too often deferred to the last moment.

The marshal, on the last evening that causes are by the above rules to be entered or set down for trial, frequently announces his determination to receive no more entries, and this proclamation, as it may be called, has the effect in some small degree of accelerating the entry.

AS TO COUNTRY CAUSES, K. B.

R. G. T. 10 &
11 G. II.

By R. G. T. 10 & 11 G. II. by all the judges of England, in every cause to be tried before them in their respective circuits, the writ and record shall be entered together, and no record shall be entered without the writ.

R. H. G. 14 G. II.

By R. G. T. 14 G. II. by all the judges of England, that no writ and record of *nisi prius* shall be received at the assizes in any county in England, unless they shall be delivered to be entered with the marshal before the first sitting of the court after the commission day, except in the counties of York and Norfolk,

and there the writs and records shall be delivered to and entered with the marshal before the first sitting of the court on the second day after the commission day, otherwise they shall not be received; and that every cause shall be tried in the order in which it shall be so entered without any preference or delay, unless it shall be made out to the satisfaction of the judge in open court, that it is impracticable or inconvenient so to do, who thereupon may make such order for the trial of the cause so put off, as to him shall seem meet. And it is further ordered, that a list of the causes when so entered as aforesaid, shall be made by the marshal, and forthwith fixed up in some public place in the *nisi prius* court, there to remain during the whole time of the assizes.

By *R. G. H. 33 (32 Pea. Ru. & Ord.) G. III.* no writ or record of *nisi prius* shall be received at the assizes in and for the county of Norfolk, or city of Norwich, unless such writ and record shall be delivered to, and entered with the marshal before the first sitting of the court on the day after the commission day.

R.G.H.33 G.III.

PRACTICAL DIRECTIONS,

AS TO ENTERING COUNTRY CAUSES.

The application for this purpose is to be made to the marshal at the lodgings of the judge on the circuit. Pay him 13s.

AS TO TOWN CAUSES, C. P.

If the cause be to be tried at London or Westminster at the sittings in term, the same must be entered two days inclusive before such sitting.

By *R. G. 32 G. III.* all records of *nisi prius* for the sittings after term in London and Middlesex, shall be passed with the clerk of the treasury, and the causes entered with the marshal two days at least before the adjournment day, and in default thereof, that the defendant shall, after eight of the clock of the evening of the second day (preceding the adjournment day, *Imp. C. P. 406*.) be at liberty to enter a *ne recipiatur*.

R. G. 32 G. III.

PRACTICAL DIRECTIONS, C. P.

The rules and practical directions, K. B. will be applicable in this court, whether in town or country causes, mutatis mutandis. Pay on setting down cause, 13s. 9d. The different practice in the two courts is marked above. See titles NE RECIPIATUR; NISI PRIUS; RECORD; TRIAL.

ENROLLING DEEDS. See title **INROLLING DEEDS.**

ENTRY. *Writ of entry to avoid the Statute of Limitations.* See title **LIMITATIONS, Statute of Limitations.**

ENTRY. *Writ of Entry sur Abatement.*

The right to bring this writ, viz. Writ of Entry sur Abatement, passes to the assignees of a bankrupt by the usual words of the deed of assignment. *Smith and Others, assignees, &c. v. Coffin and Ur, 2 Hen. Bla. 444.* The forms of pleading in this writ are rather fully set out in this report.

ENTRY OF PROCEEDINGS in Error. See title **ERROR.**

ENTRY OF RECOGNIZANCE. See title **BAIL, PROCEEDINGS AGAINST BAIL ON RECOGNIZANCE.**

ENTRY. ERROR; I. *Of Error generally, &c.*

ENTRY OF SCIRE FACIAS. See title SCIRE FACIAS.

ERROR. *Writ of Error.*

- I. Of error generally, before bail.
- II. Of bail in error.
- III. Of proceedings in error subsequent to bail. Amendment. Motion to quash.
- IV. Of abatement in error.
- V. Of the period for assignment of errors, and alleging diminution. *Certiorari*. *Quare executionem non*, in error from C. P. to K. B.
- VI. Of assignment of errors on the part of *plaintiff* in error. The like on the part of the *defendant* in error. Pleading in error.
- VII. Of the issue in error. Entry of the proceedings on the roll, where on a different roll. Of the trial of an issue in fact.
- VIII. Of the judgment in error.
- IX. Of costs in error. Of interest.
- X. Of execution in error.
- XI. Of restitution to the party.
- XII. Practical directions in error from K. B. to Exchequer Chamber.
- XIII. Practical directions in error from K. B. and Exchequer Chamber to House of Lords in Parliament.
- XIV. Practical directions in error from C. P. to K. B.
- XV. Practical directions in error, *coram vobis* or *vobis*.
- XVI. Forms in error.

I. OF ERROR GENERALLY, BEFORE BAIL.

What.

A writ of error is a commission in the form of and being, an original writ issuing out of Chancery, whereby the judges of the same, or of a superior court, are authorized to examine the record upon which a judgment was given in the same, or in an inferior court, and on such examination, to affirm or reverse the same according to law. *Spencer v. Woodward*, *Yelv.* 209. *Ca. temp. Hardw.* 346.

Where it lies most generally.

A writ of error lies for some real or alleged error in the foundation, proceeding, judgment, or execution of a suit in a court of record. 2 *Bac. Abr.* 448; and it is granted *ex debito justitiæ*, except in treason and felony. *Id.* 453; but though the observation be foreign to this compilation, it is there said that a writ of error may be had in those cases by leave of the courts. It lies upon matter of law arising upon the face of the proceedings, so that no evidence is necessary to support it. 3 *Comm.* 407.

As where in trespass against two who suffer judgment by default, if plaintiff execute writs of inquiry against them separately, and take several damages against them, and enter up final judgment for those several damages, it is error. *Mitchell v. Milbank*, 6 *T. R.* 199. So in action on a penal statute, the declaration must allege the fact to be done *contra formam statuti*, or *statutorum*, as the case may be. Stating, that by force of the statute an action accrued, &c. is not sufficient where the penalty is given by one sta-

ute, and the right of action to the informer is given by another. *Lee v. Clarke*, in error, 2 *East*, 133. Where a jury having found a verdict against eight of ten defendants only, and in favour of the other two, and a judgment was entered accordingly, held, that as the action was founded upon a breach of duty imposed by the custom of the realm, which was a breach of the law, and as the declaration was framed on a misfeasance, such verdict and judgment were not erroneous, and it was therefore affirmed in the Exchequer Chamber, in error. *Bretherton and Others v. Wood*, in error, 6 *J. B. Moore*, 141. So where on bill against three, on the *postea* it was alleged, that "the jury say that two only did undertake, &c." but judgment "that the plaintiff do recover against the three," it was held that the omission of the one name in the *postea* was no ground of error. *May v. Pige*, in error, 1 *Bing.* 315. See section VI., *post*.

But it does lie on a judgment of *respondeat ouster* on a plea to the jurisdiction. *Hodgson v. Milles*, *E.* 26 *G. III.* *K. B.* 2 *Tidd*, 1181. On what judgment error lies not.

Although this head of practice may easily admit of being very considerably extended, yet when it is considered that much of the law of error has become obsolete, or of rare application, a very elaborate statement of the great number of determinations that have taken place respecting what shall be deemed error, and what shall not, will not be expected in this place. Many of the determinations to be found in the books may at first sight seem *practical*, but as a writ of error is now most commonly, and yet most strangely permitted to be brought for the purpose of mere delay, it may be more useful to limit the selection of the cases to points of present and immediate practical importance.* Observation.

* I do not know that it is at all within the scope of a mere practical compilation, that matter professedly critical should be found in it. But although occasionally I have interspersed observations which for every practical purpose they may answer, might as well have been omitted, yet I have thought it not inconsistent with the respect I bear a profession to which my earliest and my latest, and now long attention, has been directed, to breathe a wish now and then for its advancement. That practice admits of amelioration, is in every day's experience. The consolidation rule, the order for particulars of demand and set off; the modification of the consent rule; the limitation of one action on the bail bond, and other instances of comparatively very modern innovation, shew the spirit and feeling of an enlightened court. But the groundless writ of error yet remains a positive stigma upon the practical administration of the common law. Still it may reasonably be expected, that upon a point of so much importance to the public, the public, anticipating right

must do right. Official emolument derived from actual labour, too often stands in the way of the public benefit: but where it is the need of service, emolument cannot, ought not, to be touched without compensation. Where emolument is derived without commensurate service, compensation is altogether idle; at all events justice should be done. The times demand some legislative interference in this and in other respects, so far as practice is concerned. The government has wisely consented to forego some stamp duties; but what were these in point of personal contribution, to some of the fees of office yet blotting practice? Can any age, or any time assuming to be advanced in just knowledge, the result of enlightened principle, longer hesitate to inquire wherefore suitors should yet pay for supposed entries, which are neither made nor intended to be made?

In the former edition of this compilation were subjoined some observations not quite in unison with the present; but a more extended experience has satisfied me that any thing there said in

But if it be apprehended that a writ of error will be brought for delay, and the largeness of the sum recovered be of so much importance as to render the loss of costs of little comparative consequence, the plaintiff needs not wait to tax them, but on the judgment being signed may issue execution immediately for the amount of the damages and costs found by the jury. See 5 *East*, 436, 7. 4 *Taunt.* 289.

Limitation of time for bringing error.

It may be proper to notice *in limine*, that by stat. 10 & 11 *W. III.* c. 14. no judgment in any real or personal action shall be reversed or avoided for any error or defect therein, unless the writ of error be brought and prosecuted with effect within twenty years after such judgment signed or entered of record.

The rights of infants, femmes-coverts, persons *non compos mentis*, in prison or beyond seas, are, as usual, saved by this statute; and in *Higgs v. Evans* the court would not quash a writ of error brought twenty-nine years after the judgment, because it would deprive the party of the benefit of replying the exceptions in the statutes. 2 *Str.* 837.

What is waived by bringing error.

It may be well to be aware, that where defendant, pending his motion for a new trial, served the plaintiff with a copy of an allowance of a writ of error, K. B. held it to be an admission of the facts of the case, and refused to grant a new trial. *Bennet v. Hunt*, 7 *G. III.* K. B. 2 *Tidd*, 919. The service was probably a measure of precaution should the motion fail; but although in such a case the suing error might be prudent, the service would, before the event of the motion were known, be, according to the above case, premature.

Who may bring error, i. e. of the plaintiffs in error.

Parties may restrain themselves from bringing error either by agreeing to release error as in the case of a *cognovit*, or warrant of attorney, or where they have agreed under a consolidation rule not to bring any writ of error: and this rule is binding, though manifest error be on the record. *Camden v. Edie*, 1 *H. Bl.* 21. It may be brought by the plaintiff to reverse his own judgment if erroneous, or given for a less sum than he has a right to demand, in order to enable him to bring another action. *Johnson v. Jebb*, 3 *Burr.* 1772. Feme-covert and the husband, in judgment against the feme, may join in bringing error. 1 *Roll. Abr.* 748, pl. 1. 8; and where others are joined in the action against the feme covert, they also may bring error with her husband. *Id.* pl. 19. And it will be obvious that the writ must be brought in the names of all the parties against whom the judgment is given, that it may agree with the record; and notwithstanding the death of any one of the parties he must still be named, and his death alleged in the writ, though the writ may be brought by the survivors alone. 2 *Saund.* 101. *c. n.* 101. *f. n.* 4th edit. and the numerous authorities there cited. See also *Walker v. Stokoe*, 1 *Ld. Raym.* 71. But if in trespass against two or more, one plead to issue, and there is a ver-

favour of the writ of error, or rather the writ of no-error, was wrong; and I with pleasure coincide with better and more rational views of the question,

and desire to see a revival of the obsolete rules, *E. 23 Eliz. & M. 6 & 7 Eliz. C. P.* And see 2 *Wils.* 144. Also 2 *Tidd*, 1190, &c.

dict and judgment for him, and a judgment by default and afterwards final judgment against the others, or they all plead to issue, and one is found not guilty, and there is a verdict and judgment against the others, they may bring a writ of error without the defendant who was acquitted; for they cannot say that it was to his damage; and the suit must be described in the writ according to the record. 2 Saund. 131. f. n.

And it seems that if the writ of error be brought in one description of action and it appear by the transcript to be another, such writ will not be a supersedeas, *e. g.* where the writ was case, and the transcript covenant. *Sampayo v. De Payba*, 5 Taunt. 82. In this case the defendant in error had taken several steps in error, before he discovered the mistake, and then sued out execution, treating the writ of error as a nullity. But the court of K. B. amended the writ of error, and the court of C. P. set aside the execution, but without costs.

Where one only of several defendants brings a writ of error, he must do it in the names of all; and if any one or more of them refuse to appear and assign errors, they must be summoned and severed, and then the writ of error may be proceeded in by the rest only, and the court will give them time to assign errors, till there can be a summons and severance of the others. 2 Saund. 101. f. n.

With respect to defendants in error, or those against whom error is brought, it has been holden that where one only of two defendants in error appeared and sued out a *scire facias quare executionem non*, and the plaintiff in error thereupon assigned errors, it was a waiver of the objection that the other should have joined, and the court was not to presume that he was alive. *Knox v. Costello*, 3 Burr. 1789. And principal cannot bring error on judgment against bail, nor can bail on judgment against principal. 2 Tidd, 1174, and the cases there cited.

Of defendants in error.

Although a writ of error lies from the Court of Exchequer in Scotland, to the House of Lords in England, and in like manner since the late Union, from the superior court in Ireland to the House of Lords here, yet further observations relative to error brought upon judgments given in such courts may be spared in this place: this compilation relating to proceedings in error on judgment given in the King's Bench and Common Pleas and other courts here.

From what courts to what courts error lies.

A writ of error lies from the inferior courts of records in England into the King's Bench, and not into the Common Pleas. It likewise may be brought on a judgment given in the Common Pleas at Westminster in the King's Bench, and then from the King's Bench the cause is removeable to the House of Lords. From proceedings on the law side of the Exchequer, a writ of error lies into the Court of Exchequer Chamber, before the Lord Chancellor, Lord Treasurer, and the judges of the courts of King's Bench and Common Pleas; and from thence it lies to the House of Peers. From proceedings in the King's Bench in debt, detinue, covenant, account, case, ejectment or trespass, originally begun therein by bill (except where the king is a party) it lies to the Exchequer Chamber before the justices of the Common Pleas and Barons of the Exchequer, and from

thence also to the House of Lords. But when the proceedings in the King's Bench do not first commence therein by bill, but by original writ sued out of Chancery, this takes the case out of the general rule laid down by the statute, so that the writ of error then lies without any intermediate stage of appeal, directly to the House of Lords; the dernier resort for the decision of every civil action. Each court of appeal may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior court; but none of them are final, save only the House of Peers, to whose judicial decisions all other tribunals must therefore submit and conform their own. 3 *Comm.* 410.* 411.* and the numerous authorities there cited.

It may be useful to mention in this place, although omitted by the learned commentator, that a writ of error lies in K. B. upon a judgment in a county palatine. 1 *Roll. Abr.* 745; and by statutes 34 & 35 *H. VIII. c.* 26. *s.* 113. 1 *W. & M. c.* 27. *s.* 4. error lies in K. B. on judgments given in the great sessions in Wales. But it also appears that, upon a judgment given in the hustings in London, a writ of error lies at St. Martin's before certain commissioners appointed under the great seal, and from thence immediately into the House of Lords. 1 *Roll. Abr.* 745, pl. 19. 2 *Bac.* 484; but if the judgment be on the equity side of the mayor's court, the appeal lies immediately to the House of Lords. Emerson on the City Courts, 86. Also that if an erroneous judgment be given in the Cinque Ports, a writ of error does not lie into the K. B. but it shall be redressed before the Constable at Dover at the court at Shepway. 4 *Inst.* 224. Upon a judgment given in the court of Stannaries in the duchy of Cornwall for any matter touching the Stannaries, no writ of error lies to K. B. but it may be observed, that the course is, to appeal to the warden of the Stannaries, and from him to the prince; and when there is no prince, to the king's counsel. 1 *Roll. Abr.* 745, pl. 8. And *per Holt, C. J.* in courts newly constituted, and which are empowered to proceed in a method different from the course of common law, their judgment is not subject to a writ of error; but yet B. R. may examine them by *certiorari* or *mandamus*. *Groenvelt v. Burwell*, 3 *Salk.* 148.

And in an action of debt in the *Palace Court*, the defendant having suffered judgment to go by default, that court refused to allow the plaintiff to sign final judgment, as by law it was contended he might do, but K. B. refused a *mandamus* to compel the inferior court to allow final judgment to be signed, leaving the plaintiff to his remedy by writ of error, when he had taken the necessary steps for that purpose. *Rex v. Marquis of Conyngham*, 1 *D. & R.* 529.

There seems to be a material distinction between an error or supposed error in giving judgment, and an error in fact. Error does not lie for fact either in the Exchequer Chamber, or in the House of Lords. *Hopkins v. Weigglesworth*, 1 *Ventr.* 207. *Roe v. More*, *Com. Rep.* 597. A writ of error may be brought in the same court for an error in fact, but not in the Exchequer Chamber. 1 *Roll. Abr.* 755. *Binns v. Pratt*, 1 *Chit. R.* 369. or House of Lords. *Knole's Case*, 3 *Salk.* 145. The writ of error in K. B.

Where writ of
error *coram nobis*.

thus brought, is properly called error *coram nobis* (not *coram vobis*. See the writ.) But in the writ of error brought in K. B. to reverse a judgment in C. P. it is properly called a writ of error *coram vobis*; but if the error be in the judgment, and not in the process, the writ of error must be brought in another court. 1 *Roll. Abr.* 746, pl. 1. 2 *Bac. Abr.* 215; and a writ of error *coram nobis* can be brought after abatement of error brought in K. B. whether by judgment of the court, by plea, death, or otherwise. *ib.* 753. (*Quere*), pl. 1. and if it be quashed for any other fault than variance. *Cooper v. Ginger*, 2 *Ld. Raym.* 1403. After affirmance in K. B. error *coram nobis* does not lie. *Burleigh v. Harris*, 2 *Str.* 975. *contra* *Winchurch v. Belwood*, 1 *Salk.* 337; but this case was denied to be law, in that of *Burleigh v. Harris*, 2 *Str.* 975. So after affirmance in the Exchequer Chamber, error *coram nobis* does not lie in K. B. *Lambell v. Pretty-John*, 1 *Str.* 690; nor where error upon a judgment in K. B. is brought in the Exchequer Chamber. 1 *Roll. Abr.* 755, pl. 16; and when brought, if judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for defendant on another; and the defendant bring a writ of error to reverse the judgment on the first count, the court of error cannot examine the legality of the judgment on the second count; no error being assigned on that part of the record. *Campbell v. French*, 6 *T. R.* 200.

Where, *coram vobis*.

It is said, 2 *Crompt.* 394, that the statutes requiring bail do not extend to this writ.

Where the proceeding is in K. B. by bill, and judgment shall have been given therein, the court of Exchequer Chamber is enabled to exercise a jurisdiction in respect of a writ of error brought on such judgment, in consequence of the statute 27 *Eliz.*; for before that statute, error on a judgment in K. B. whether proceedings were by bill or by original, only lay in parliament, as is still the case where proceedings shall have been commenced by original. By c. 18. of the above statute where any judgment shall be given in K. B. in any suit or action of debt, detinue, covenant, account, action upon the case, *ejectione firmae*, or trespass, first commenced, or to be first commenced there, (other than such only where the queen's majesty shall be party) the party, plaintiff, or defendant against whom any such judgment shall be given, may at his election sue forth out of the Court of Chancery a special writ of error, to be devised in the said Court of Chancery directed to the Chief Justice of the said court of the King's Bench for the time being, commanding him to cause the said record, and all things concerning the said judgment, to be brought before the justices of the Common Bench and the barons of the Exchequer into the Exchequer Chamber, there to be examined by the said justices of the Common Bench and barons aforesaid; which said justices of the Common Bench and such barons of the Exchequer as are of the coif, or six of them at the least, shall thereupon have full power and authority to examine all such errors as shall be assigned or found in or upon any such judgment, and thereupon to reverse or affirm the said judgment as the law shall require, other than for errors to be assigned or found for or concerning the jurisdiction of the said court of King's Bench, or for any want of form in any writ, return, plaint, bill, declaration, or other pleading pro-

Of error from K. B. by bill.

Stat. 27 *Eliz.* c. 8.

ERROR; I. Of Error generally, &c.

cess, verdict, or proceeding whatsoever; and that after that the said judgment shall be affirmed or reversed, the said record and all things concerning the same shall be removed and brought back into the said court of the King's Bench, that such further proceeding may be had thereupon, as well for execution as otherwise, as shall appertain.

By s. 3. such reversal or affirmation of any such former judgment shall not be so final, but that the party who findeth him grieved therewith, shall and may sue in the high court of parliament for the further and due examination of the said judgment, in such sort as is now used upon erroneous judgment in the said court of King's Bench.

To what actions
statute confined.

Actions of debt, detinue, covenant, account, action upon the case, ejectment, and trespass are only mentioned in the statute.

In replevin, 2 *Roll. Rep.* 140. *scandalum magnatum*; *Cro. Car.* 142. *Ashby v. White*, 2 *Ld. Raym.* 954. rescous; *Vaughan v. Williams*, *Cro. Jac.* 171. ravishment of ward; *Barnefield v. Hutchins*, 2 *Roll. Rep.* 154. and judgment in *scire facias* upon a recognizance of bail. *Vaughan v. Justice Williams* on judgments given therein in K. B. *Cro. Jac.* 171. error can only be brought in parliament. It is clear that error upon a judgment in B. R. in *scire facias*, upon a recognizance of bail, cannot be brought in the Exchequer Chamber. 1 *Ld. Raym.* 98. See also *ib.* 328. See 2 *Saund.* 101. *n.*

If judgment con-
firmed in K. B.
where error
brought.

If a judgment be affirmed in K. B. on error, a writ of error lies from thence to the House of Lords, and not to the Exchequer Chamber. *Harvey v. Williams*, 2 *Buls.* 162.

And it has also been holden, that if a *scire facias* be brought to reverse a judgment against the party or his executors, a writ of error will lie in the Exchequer Chamber, *tam in redditione judicii quam in adjudicatione executionis* [as well in the rendering the judgment as in the awarding of execution]. *Hartop v. Holt*, 1 *Ld. Raym.* 98. but not upon an award of execution only. *Ibid.* *Crow v. Maddock*, *And.* 287. even though the judgment has been affirmed in the Exchequer Chamber, and execution is afterwards awarded in K. B. *ibid.* 97. And notwithstanding former doubts, it has been determined that a writ of error lies in the Exchequer Chamber upon a judgment in an action of debt *qui tam*. *Lloyd v. Skutt*, *Dougl.* 350. *Lloyd v. Skutt*, *T.* 23 G. III. K. B. 2 *Tidd*, 1186.

But no writ of error can be brought upon an interlocutory judgment. *Samuel v. Judin*, 6 *East*, 333.

What a court of
error cannot
award.

A court of error cannot award a *venire de novo* where the proceedings originate in an inferior court. *Bishop v. Kaye*, 3 B. & A. 610.

Of teste and re-
turn of writ.

The teste of a writ of error need not be on a seal day. *Hill v. Tebb*, 1 N. R. 298. Notwithstanding former decisions, a writ of error tested before the judgment is good, provided the judgment be given before the return of the writ; and as the judgment relates to the first day of the term, a writ of error, returnable after that day, will remove the record whenever the judgment is entered. *Prydyard v. Thomas*, 1 *Ventr.* 96. *Baker v. Bulstrode*, *ib.* 255. and the cases cited in the margin. See also *Morfoot v. Chivers*,

1 *Str.* 632. and *Jaques v. Nixon*, 1 *T. R.* 279. Still, however, a writ of error will not remove a judgment given after the term in which the writ of error is returnable; but a writ of error so returnable before the judgment may be quashed, unless the plaintiff has delayed signing judgment until after the return of the writ on purpose to defeat it. 2 *Saund.* 101. *d. e. n.* 4th edition, and the authorities there cited. And see *Hill v. Tebb*, 1 *N. R.* 298, wherein it was ruled, that a writ of error may be made returnable before the day on which the judgment is actually signed, if the writ of error and judgment are of the same term. If the proceedings are by original, the writ is returnable wheresoever, &c. If in the Exchequer Chamber, on a day certain; and in parliament the writ is returnable before the king in his present parliament, immediately.

Having attempted to ascertain the foregoing points, the practitioner may be better enabled to distinguish how far some or more of them may be applicable to the particular case in which it may be expedient to bring error; and he may next advert to the practical cases which have been determined, as to the order of proceeding to be adopted by the respective parties in error, from the actual issuing of the writ to the conclusion of the proceedings, beginning with those which more immediately concern the party bringing error; which party is called the plaintiff in error.

Observations as to the foregoing points.

Although generally brought by the attorney for the party who conducted the original suit, it has been decided, that a writ of error is to be considered as a new action; and therefore the defendant in the original action may, for the purpose of bringing error, change his attorney without obtaining a judge's order. *Batchelor v. Ellis*, 7 *T. R.* 337; and by analogy, this decision, it is presumed, may extend to the plaintiff in the original action, bringing error.

To bring error, attorney may be changed without a judge's order.

The relation which the teste and return of the writ of error bear to the final judgment in the cause, will have been seen above; and *R. G. E.* 36 *Car.* II. orders that all writs of error returnable before the justices of the Common Bench and the barons of the Exchequer Chamber shall, *without delay*, be delivered to the clerk of the errors for the time being, and that no person shall be bound to forbear suing out execution on pretence of any such writ of error, before the writ shall be delivered to the clerk of the errors. In the case of *Jaques v. Nixon*, 1 *T. R.* 280, cited above, it was ruled, that if the writ be sued out and allowed before final judgment, and the plaintiff will not sign the same till a subsequent term after the return of the writ, in order to avoid the effect of it, and then sue out execution, the court will set it aside. *Howston v. Howston*, *T.* 25 *G. III.* K. B. 2 *Tidd*, 1186. So where several years had elapsed after judgment obtained, and the plaintiff brought an action thereon, and after it had been signed in the latter action, the defendant sued out a writ of error upon the former judgment, it was held that the plaintiff might notwithstanding take out execution on the second judgment. *Bishop v. Best*, 3 *B. & A.* 275.

Where a supersedeas or not.

Where a *supersedeas* or not, continued.

But if a writ of error is sued out before final judgment, and the allowance not served until after the writ of error is spent, the plaintiff may afterwards regularly sign final judgment. *Stevens v. Ingram*, 3 *Taunt.* 384. And it has since been ruled, that a writ of error may operate as a stay of proceedings, though sued out before interlocutory judgment. *Emanuel v. Martin*, 2 *M. & S.* 334.

A writ of error sued out after final judgment, and before execution executed, is a *supersedeas* from the time of its allowance. *Hague*, gent. one, &c. *v.* —, *E.* 45 *G. III.* *K. B.* 2 *Tidd*, 1187. And see 2 *Saund.* 101. *h. n.* and the authorities there cited. So from the moment of the allowance, the allowance itself is a *supersedeas*, without any communication with the plaintiff. In this case the judgment was signed the 8th July; and on the same day a *fi. fa.* was sent into Sussex; in which county it was executed the 10th, without notice of allowance of the writ of error obtained on the 9th. *Hawkins v. Jones*, 5 *Taunt.* 204.

And it seems that a fraction of a day will be taken into consideration as to whether if the allowance operate as *supersedeas* or not. For where the allowance was obtained at twenty-eight minutes after eleven o'clock, and execution issued twenty minutes after one, and notice of allowance given, held that writ of error operated as *supersedeas*. — *v. Butler*, 1 *Chit. R.* 241.

And in an action against a sheriff for not returning *nulla bonâ* to a *fi. fa.* which had been lodged with him, at seven o'clock in the evening, to be levied, and no writ of error had been allowed at half-past six on the evening of that day, but it appeared that the allowance was made within the day: Held, first, that such allowance operated as a *supersedeas*, as it might be made at any time before the day expired; secondly, that the sheriff should not have returned *nulla bonâ*, but that a writ of error had been allowed, and the court finally decided that the plaintiff was entitled to recover nominal damages. *Cleghorn v. Des Anges*, 3 *J. B. Moore*, 83. *Gravall v. Stimpson*, 1 *B. & P.* 478, and the cases there cited.

But although writ of error be a *supersedeas* from the time of its being allowed, yet where notice was wilfully withheld, the execution was set aside without costs, and on terms that no action should be brought. *Braithwaite v. Brown*, 1 *Chit. R.* 238.

A writ of error is no *supersedeas* of execution, unless bail in error be put in and notice thereof given within the time limited by the rules of the court. *Attenbury v. Smith*, 2 *D. & R.* 85.

Nor unless the defendant perfect his bail in time. *Smith v. Howard*, *Id.*

The allowance is a *supersedeas* of all proceeding in the original cause; for the plaintiff cannot take out a *capias ad satisfaciendum*, and have it returned *non est inventus* in order to proceed against the bail. *Sweetapple v. Goodfellow*, 2 *Str.* 867. *Dudley v. Stokes*, 2 *Bla. Rep.* 1183; nor can he call for such return if allowed, after *capias ad satisfaciendum* sued out. *Smith v. Nicholson*, 2 *Str.* 1186; even though it should have lain in the sheriff's office the four days before the allowance. *Perry v. Campbell*, 3 *T. R.* 390. So likewise, if the original plaintiff, after such

allowance, bring an action on the judgment and recover, it will be obvious he cannot sue out execution on the second judgment till the writ of error be determined. *Taswell v. Stone*, 4 *Burr.* 2454. *Benwell v. Black*, 3 *T. R.* 643. See the case of *Bishop v. Best*, 3 *B. & A.* 275, cited *ante*, page 609.

Where a *superse-
deas* or not, con-
tinued.

But though it may seem anomalous, yet in strict conformity with the different rules of court respecting prisoners, it appears that a prisoner after judgment against him may, notwithstanding the allowance of a writ of error, be charged in execution. *Fisher v. Macnamara*, 1 *B. & P.* 292. And where an action is brought on a judgment recovered in K. B. and after judgment the defendant brings a writ of error, and obtains a rule to stay proceedings in the mean time, and the plaintiff die before judgment affirmed, the court will not permit judgment to be entered, *nunc pro tunc*. *Bates v. Lockwood*, 1 *T. R.* 637. But if the action be brought on a judgment recovered in C. P. the court will not stay proceedings pending a writ of error, without the defendants giving judgment in the second action, *Ibid.* And by the case of *Meagher v. Vandyck*, 2 *B. & P.* 370, it was determined that a writ of error operates as a *superse-
deas* from the time of the allowance, though it be not served till after execution. So, though the writ of error be not returned. *Sampson v. Brown*, 2 *East*, 439. And the allowance may be served *before the plaintiff is entitled to sign final judgment*. *Payne v. Whaley*, 2 *B. & P.* 137.

The allowance of the writ of error will not be deemed a *superse-
deas* where it shall manifestly be brought against good faith. *Cates v. West*, 2 *T. R.* 183. *Per Cur. E.* 44 *G. III.* K. B. 2 *Tidd*, 1188.

The defendant executed a warrant of attorney to enter up judgment, with the usual release of errors and defeazance, and signed an undertaking written beneath the defeazance, that no writ of error should be brought. The plaintiff revived the judgment by *scire facias*, to which the defendant pleaded, and the plaintiff had judgment; whereupon the defendant brought a writ of error, which the court of C. P. on motion set aside; the defendant having contended, first, that this was a release of error, and ought to have been pleaded; and secondly, that it did not apply to the judgment on the *scire facias*. *Badely v. Shafto*, 8 *Taunt.* 434.

Where set aside
or not.

Nor can it be prosecuted by executors, where the testator's attorney had agreed not to bring error. Executors of *Wright v. Nutt*, 1 *T. R.* 388. See *Evans v. Gilbert*, 4 *T. R.* 436, and several other cases, title BAIL. *Surrender where error brought*, page 247, *ante*, and particularly as implying some diversity from former decisions: *Rawlins v. Perry*, 1 *N. R.* 307, there also cited. And notwithstanding *Box v. Bennett*, 1 *Hen. Bla.* 432, *Entwistle v. Shepherd*, 2 *T. R.* 78, and *Kempland v. Macauley*, 4 *T. R.* 436, the court in a subsequent case stayed proceedings pending a writ of error on a judgment of nonsuit, there appearing no declaration of the party, that the writ of error was brought for delay. *Levett v. Perry*, 5 *T. R.* 669. So the court would not permit execution to be taken out pending a writ of error in parliament, on the ground that the writ of error is brought for delay, merely because the de-

ERROR; I. *Of Error; where set aside, &c.*

defendant suffered the judgment to be affirmed in the Exchequer Chamber, without any objection. *Harrison v. Grote*, 6 T. R. 400. And the court stayed the proceedings in an action on the judgment, notwithstanding the plaintiff swore that the writ of error was brought for delay, and that he offered to the defendant's attorney to waive the judgment, if he would point out any error, which was refused. *Christie v. Richardson*, 3 T. R. 78. But the court refused to set aside an execution issued pending a writ of error, where, after judgment, the party's attorney proposed to give a cognovit for the debt and costs payable at a future time, and offered to sign it, observing that it would save expence to the parties, as he should otherwise be under the necessity of bringing a writ of error to obtain the time he had requested in the cognovit, for that he must obtain time. *Spooner and Others v. Garland*, 2 M. & S. 474; and see also *Hawkins v. Snuggs*, *id.* 476, where the rule laid down appears to be, that if the party has declared he will bring a writ of error for delay, and afterwards sue out one, it shall be incumbent on him to shew a reasonable ground of error to the court, or at least that there is some colour for his writ of error. And see *Mee v. Hopkins*, 2 D. & R. 208; also 2 *Tidd*, 1188. Where, however, it did not appear but that the declaration of the defendant that he would sue out a writ of error, and delay plaintiff, was made before any action pending, leave was refused. *Baskett v. Barnard and Another*, 4 M. & S. 331. And see *Redford v. Garrod*, 1 J. B. Moore, 253. 7 Taunt. 537. And in this case it was held, that the affidavit to ground the rule might be made before the judgment signed. *Id. ib.* So where the defendant's attorney, upon the taxation of costs, stated that there was error upon the record, viz. a variance between the affidavit to hold to bail, and the declaration. He had previously told the plaintiff, that he would never recover the fruits of his judgment, as the defendant was not in a situation to pay, he never having paid him any thing on account of costs, the plaintiff having been served with the allowance of a writ of error, and the defendant having disclosed no other ground of error by his affidavit, the court refused to set aside an execution issued after the allowance of a writ of error. *Eicke v. Sowerby*, 1 B. & C. 287. But where the defendant having suffered judgment by default in an action brought against him on bills of exchange, sued out a writ of error after a rule to compute principal and interest, and had acknowledged the debt to be due before and since the commencement of the action, it was held, that the plaintiff could not take out execution without some express declaration either by the defendant or his attorney, that the writ of error was brought for delay. *Hamilton v. Schofield*, 6 J. B. Moore, 45.

When a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error, brought in the same court, is not a *supersedeas* of execution, as the first is, and execution may then be sued out without leave of the court; but in error of matters of fact, *coram vobis*, which is not within the statutes requiring bail in error, the writ of error is or is not a *supersedeas*, according to circumstances, and the court must be moved

for leave to sue out execution pending it. *Birch v. Triste*, 8 *East*, 412.

But where the writ of execution is issued, and the sheriff has levied under it, but before the sale, a writ of error is allowed, the sheriff must proceed to sale, and return the money into court, to abide the event of the writ of error. *Meriton v. Stevens*, *Willes*, 271, and the cases there cited. In this case a most elaborate opinion of the court was given by the reporter; and also as to whether the *supersedeas* should operate from the time of sealing the writ of error; and that it did, was the opinion of Fortescue, J., or from the time of the allowance, was in that decision deeply gone into. It should, however, be recollected, that the party may waive his costs and take out execution before a writ of error allowed. *Doe, d. Messiter v. Dynely*, 4 *Taunt.* 289, and cited *ante*.

As to its being a partial *supersedeas*.

II. OF BAIL IN ERROR.

But it may be taken as a general rule, that if requisite, bail in error must be duly put in, or the writ of error will not operate a *supersedeas* of execution on the original action. See *Lane v. Bacchus*, 2 *T. R.* 44. *Attenbury v. Smith*, 2 *D. & R.* 85. Or notice of bail duly given. *Id. ib.* *Smith v. Howard*, *Id.* both cited page 610.

As to bail in error.

And if a defendant bring a writ of error, and put in sham bail, the plaintiff may treat them as a nullity, and issue execution. *Ward v. Levi*, 1 *B. & C.* 268. *Crum v. Kitchen*, *Id.* 269, *n.* or of proceeding on the judgment therein, *Smith v. Shepherd*, 5 *T. R.* 9. and it must be perfected, *Bicknell v. Longstaffe*, 6 *T. R.* 455. The practice upon this head is very clear, and both by the statutes to be now recited, and by the several decisions to which reference is above made, well defined.

And no motion can be made to stay the proceedings in an action on a judgment pending a writ of error, until bail have been put in and perfected. *Abraham v. Pugh*, 5 *B. & A.* 903.

By statute 3 *Jac. I. c. 8.* perpetual by 3 *C. I. c. 4. s. 4.* no execution shall be stayed or delayed, upon or by any writ of error, or *supersedeas* thereupon to be sued for the reversing of any judgment in any action or bill of debt, upon any single bond for debt, or upon any obligation, with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contracts sued in any of the courts of record at Westminster, or in the counties palatine of Chester, Lancaster, or Durham, or the courts of Great Session in Wales; nor (by stat. 19 *G. III. c. 70. s. 5.*) for the reversing of any judgment given in any inferior court of record where the damages are * under £10 unless the person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court wherein

Statutes 3 *Jac. I. c. 8.* perpetual by 3 *C. I. c. 4. s. 4.* as to bail in error.

* Mr. Serjeant Williams, in reciting this statute, adds, "that is, as it is conceived where the damages laid in the declaration;" and Mr. Tidd, when reciting this statute, adds a "*Quere* as

to the damages here referred to; whether they are the damages laid in the declaration, or the damages recovered; and if the latter, whether they are with or without costs?"

the judgment is given shall allow of, shall first be bound unto the party for whom the judgment is given, by recognizance, to be acknowledged in the same court, in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect; and also to satisfy and pay, if the said judgment be affirmed (or the writ of error *non-prossed*, 19 G. III. c. 70. s. 5.) all and singular the debts, damages, and costs, adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of execution.

To what actions
statute limited.

Stat. 3 Jac. I. c. 8. extends only to the actions specified in the act, and to all judgments therein, as well by default on demurrer or *nul tiel record*, as after verdict. But if a declaration in debt contain any one count on a contract on which debt would not lie at the time of passing this statute, bail in error is not necessary; neither does the statute extend, *Webb v. Geddes*, 1 Taunt. 540, to actions upon the case on bills of exchange. *Vernat v. Debuste*, cited under the name of *Vernett v. Debushe*, 1 Show. 15, nor to actions of debt on bond conditioned for performance of covenants. *Gilling v. Baker*, 2 Buls. 54. though one of the covenants be for the payment of money, and the action be brought for the non-performance of that covenant. *Gerard v. Danby*, Carth. 28. *Butler v. Brushfield*, 10 East, 407. nor for performance of an award. *Gilling v. Baker*, 2 Buls. 54. nor to debt on a general bond of indemnity, 1 Show. 14. And see *Flanagan v. Watkins*, 1 B. & C. 316; but where a person who had entered into a bond as surety for another, to pay a sum of money to a third person, took a counter bond conditioned for payment of the money by the principal to such third person by way of indemnity, the court held it to be a case within the statute, and therefore that bail was necessary, *Huddy v. Gifford*, Com. R. 321, and though *Parker*, Ld. C.J. and *Pratt*, J. inclined *contra* in *Hammond v. Webb*, 10 Mod. 281, yet no judgment was given in it. Com. R. 323. See also *Dean of St. Paul's v. Capell*, 1 Lev. 117. And bail is requisite in error on a judgment obtained on a bottomree bond. 2 Williams's Saund. 101. *k. n.* and the cases there cited, who, however, as to this point, refers to *Desbordes v. Horsey*, 2 Str. 959, and to *Woods and Armstrong*, Bar. 78, and others. See also *Chauvett v. Alfray*, 2 Burr. 746, as to where a bond was given as a security to pay 15s. in the pound by instalments, bail was held necessary, which seems to be contrary to *Thrale v. Vaughan*, 2 Str. 1190, in which bail was held not necessary. In that case the bond was conditioned for the payment of the value of such beer as the plaintiff should furnish a third person with, not exceeding £100. S. C. 1 Wils. 19; nor to debt upon an account stated. *Alexander v. Biss*, 7 T. R. 449, and the cases there cited. But where a mortgage deed contained a covenant for the re-payment of the money, it was held within the statute. *Buckney v. Metham*, 3 Taunt. 383. It has also been determined lately, that debt will not lie on a bill of exchange against the acceptor, and therefore that bail in error is not necessary upon a judgment in debt against the acceptor of a bill of exchange; nor upon a judgment for goods sold and delivered; or for money paid, lent, or had and received; nor to debt for work and labour, goods sold and delivered, or money had

Where bail ne-
cessary or not,
under statute
3 Jac. I. c. 8.

and received. *Webb v. Geddes*, 1 *Taunt.* 540, but only where it is brought on a specific contract. *Ablet v. Ellis*, 1 *B. & P.* 249. But as to debt not lying against the acceptor, see *Chit. on Bills, &c.* 428, 9, n.

Bail is unnecessary where error is brought upon a judgment obtained in an action of debt upon a prior judgment. *Bidleson v. Whytel*, 3 *Burr.* 1548. 1 *Bla. Rep.* 506; and it seems also unnecessary upon a judgment in an action of debt upon recognizance of bail. *Trinder v. Watson*, 3 *Burr.* 1566. *S. P. Bar.* 194. See also *Dell v. Wild*, 8 *East*, 240, where it was held that a writ of error upon a judgment in debt on a recognizance of bail is a stay of execution not being within the exception of the above statute of 3 *Jac.* 1. c. 8. And it has been lately determined, that where a writ of error is brought upon a judgment on demurrer in a case of *scire facias*, sued out pursuant to the stat. 8 & 9 *W. III.* c. 11. s. 8. bail in error is not required. *Sparkes v. O'Kelly*, 1 *Taunt.* 168. But where a judgment in C. P. is affirmed on a writ of error in K. B. or a judgment in K. B. is affirmed in the Exchequer Chamber, new bail must be given on bringing a writ of error in Parliament, although bail was put in on the first writ of error. *Tilly v. Richardson*, *Ld. Raym.* 840.

In *Chauvett v. Alfray*, 2 *Burr.* 746, cited *ante*, 614, it was said as the ground of the decision, that the stat. 3 *Jac.* 1. c. 8. is remedial law, and ought to be construed liberally; but in *Bidleson v. Whytel*, 3 *Burr.* 1545, also above cited, it was held that the statute ought rather to be taken literally than extended.

Strict or liberal construction of the statute.

Statute 3 *Jac.* I. c. 8. was extended by stat. 13 *C. II.* st. 2. s. 9. to other actions, which enacts, that no execution shall be stayed in any of the courts aforesaid (*the courts which are mentioned in statute 3 Jac. I. c. 8.*) by any writ or writs of error or *supersedeas* thereupon after verdict and judgment in any action of debt grounded upon the statute 2 *Ed.* VI. for not setting forth tithes, nor in any action upon the case upon any promise for payment of money, actions *sur trover*, actions of covenant, detinue, and trespass, unless such recognizance, and in such manner as by the said act of 3 *Jac.* I. is directed, shall be first acknowledged in the court where the judgment is given. And by statute 16 & 17 *Car.* II. c. 8. s. 3. (*perpetual by statute 22 & 23 Car. II. c. 4.*) no execution shall be stayed in any of the aforesaid (*mentioned in 3 Jac. I.*) by writ of error or *supersedeas* thereupon after verdict and judgment in any action personal whatsoever, unless a recognizance with condition, according to the statute 3 *Jac.* I. shall be first acknowledged in the court where such judgment shall be given. And further, that in writs of error to be brought upon any judgment after verdict in any writ of dower, or in any action of *ejectione firmae*, no execution shall be stayed unless the plaintiff in such writ of error shall be bound unto the plaintiff in such writ of dower, or action of *ejectione firmae*, in such reasonable sum as the court to which such writ of error shall be directed shall think fit, with condition, that if the judgment shall be affirmed, or the writ of error discontinued, in default of the plaintiff therein, or the said plaintiff be nonsuit in such writ of error, that then the said plaintiff shall pay such costs, damages, and sum and sums of money as shall

Extended by stat. 13 *C. II.* st. 2. s. 9.

be awarded upon or after such judgment affirmed, discontinuance or nonsuit. And by section 4, the court wherein such execution ought to be granted upon such affirmation, discontinuance, or nonsuit, shall issue a writ to inquire as well of the mesne profits as of the damages by any waste committed after the first judgment in dower or in *ejectione firma*, and upon the return thereof judgment shall be given, and execution awarded for such mesne profits and damages, and also for costs of suit. By sect. 5, the act shall not extend to any writ of error to be brought by any executor or administrator, nor unto any action popular, nor unto any other action upon any penal law or statute except actions of debt for not setting forth tithes, nor to any indictment, presentment, inquisition, information, or appeal.

Where a plaintiff in error was also the plaintiff below, it was held that he was not required to give bail in error, and that the case was not within the stat. 3 Jac. I. c. 8. and having given bail by mistake, the bail were exonerated. *Freeman v. Garden*, 1 D. & R. 184.

A recognizance entered into by the bail in error without the principal is good. *Dixon v. Dixon*, 2 B. & P. 443. It is observed, 2 Saund. 101. n. that the statutes are confined to judgments after verdict, and do not extend, like the statute of 3 Jac. I. c. 8. to judgments by default, upon demurrer or *nul tiel* to record; therefore a writ of error upon a judgment by any of these three last ways, is a *supersedeas* without bail in such actions as are not enumerated by the statute 3 Jac. I.

But in error on verdict and judgment on *scire facias* against bail, there must be bail for *scire facias* in a personal action, and therefore within the statute of 16 & 17 Car. II. c. 8. *Pulteney v. Townson*, 2 Bl. Rep. 1227. So where judgment has been obtained against an executor or administrator *de bonis propriis*, and he bring error, he must put in bail thereon in cases where it would be required of other persons. *Fitz-William v. Moore*, 1 Lev. 245.

In the Ex. Ch. the bail engages to pay the sum recovered by the judgment, and such further costs of suit, sum and sums of money as shall be awarded for delay of execution.

In the C. P. the recognizance on writ of error returnable in K. B. is, that the plaintiff shall prosecute his writ of error with effect, and if judgment be affirmed, shall satisfy and pay the debt, damages, and costs recovered, together with such costs and damages as shall be awarded by reason of the delay of execution, or else that they the bail shall do it for him.

Bail in error cannot be put in before a commissioner in the country. *Lushington and Godfrey v. Doe*, *Barnes*, 78.

The case of *Jaques v. Nixon*, 1 T. R. 279, determined that bail in error must be put in within four days after final judgment signed, without reference to the time of the allowance, or serving the copy of it. And the case of *Bennett v. Nichols*, 4 T. R. 121, determined that those four days were to be reckoned exclusively of the day such judgment was signed.

Though it be a general rule not to grant time for adding and justifying bail in error, in lieu of those of whom notice of justification has already been given, yet, if the bail are prevented coming

Plaintiff below, plaintiff in error needs not find bail.

Principal need not enter into recognizance in bail in error.

Further observations as to what cases these statutes extend.

The recognizance in error in the Exchequer Chamber.

In the Common Pleas.

Within what time bail must be put in.

Where time granted.

up by any misconduct of the opposite party, time will be given to put in other bail. *Dyott v. Dunn* (in error), 1 *D. & R.* 9.

The allowance of the writ of error is itself a *supersedeas*. *Jaques v. Nixon*, 1 *T. R.* 279; and the service of the allowance is only material to bring the party into contempt, but the writ of error is not a *supersedeas* from the sealing, but from the delivery to the clerk of the errors, 2 *Bar.* 164. 170. In *Jaques v. Nixon*, the case of *Doe v. Bracebridge* (a case very particularly within the editor's own knowledge) was cited and recognized, and in which the court, assenting to the practice as stated by Mr. Cooper, had determined, that though a writ of error may be allowed before, it could have no effect till the judgment is actually signed, and that the party is allowed four days after the signing of the judgment to put in bail: for before the judgment, no bail can possibly justify. The distinction is thus apparent, that if a writ of error be allowed before judgment, the time of putting in bail runs from the signing of the judgment; but where it is allowed after judgment, the time of putting in bail runs from the time of the allowance, that is, after the delivery of the writ to the clerk of the errors. *Gravall v. Stimpson*, 1 *B. & P.* 478, 9. See *Blackburn v. Kymér*, 1 *Marsh.* 278, where it was ruled that the time for putting in bail, was to be reckoned from the time when the taxation of costs is completed by the insertion of the sum.

And in *Lane v. Bacchus*, 2 *T. R.* 44, the court would not set aside an execution sued out before, but executed after the allowance of the writ of error served on the sheriff and the party, if the plaintiff in error has not regularly put in bail, and such writ of error becomes a nullity. The language of the court in this case being, that the party taking out execution after the allowance of a writ of error and before bail put in, does it at his peril; for if the writ of error be regularly followed up, the execution will be set aside.

A writ of error is no *supersedeas* of execution, unless bail in error be put in and notice thereof given within the time limited by the rules of the court. *Attenbury v. Smith*, 2 *D. & R.* 85.

If a defendant bring a writ of error, and put in sham bail, the plaintiff may treat them as a nullity, and issue execution. *Ward v. Levi*, 1 *B. & C.* 268.

Where hired bail who were insolvent, of whom notice had been given, and to whom no exception was entered, became bail in error, and the plaintiff treating the writ of error and the bail as nullities, entered up judgment and took out execution; held, that the execution was regular, and the court discharged the rule for setting it aside with costs. *Ward v. Levi*, 2 *D. & R.* 421. *Crum v. Kitchen*. *Id.* S. P. 1 *B. & C.* 268. S. C. C.

If on a bond debt, double the sum secured by the bond be the sum for which the bail bind themselves in the recognizance in error, it is sufficient though a further sum be due for interest and costs, and nominal damages have been recovered. *Dixon v. Dixon*, 2 *B. & P.* 448.

As to the sum
bail bound in
debt on bond.

The statute of 3 *Jac. I.* has given rise to a rule that in personal actions the recognizance shall be acknowledged in double the sum adjudged to be recovered by the former judgment, see *Reed v.*

As to sum bail
bound in eject-
ment.

Cooper, 5 *Taunt.* 320, though upon error in debt upon a bond, the bail is to be bound in double the penalty recovered, yet by the course of the court (K. B.) it is sufficient if they justify in double what is really due. *Gomez Serra v. Munez*, 2 *Str.* 820. See also *Moore v. Lynch*, 1 *Wils.* 213.

A recognizance in error on ejectment ought to be in the value of two years mesne profits, and in double costs in both courts. *Roe, d. Fenwick v. Pearson*, *Bar.* 103. *Thomas v. Goodtitle*, 4 *Burr.* 2501. And where the plaintiff issued execution in an action of ejectment after writ of error brought by the defendant, on the ground that although the defendant had entered into a recognizance, 16 & 17 *Car. II. c. 8.* he had not given notice of the terms of such recognizance, and the courts finding that those terms were such as had been invariably used, thought a notice unnecessary; and consequently, set aside the execution with costs. *Doe, d. Webb v. Goundry*, 1 *J.B. Moore*, 118.

But the bail in error are not chargeable in an action upon the recognizance with mesne profits, where they have not been ascertained by writ of inquiry pursuant to 16 & 17 *Car. II. c. 8.* *Doe, d. Reynolds v. Sawyer*, 1 *M. & S.* 247.

Bail in error not
liable to interest.

Bail in error are not liable for interest, although the original action was on a promissory note. *Anon.* 6 *Price*, 338.

Where bail in
error not dis-
charged.

If a defendant in error (the plaintiff in the action) upon judgment being affirmed, take in execution the body of the plaintiff in error, for the debt, damages, and costs in error, he does not thereby discharge the bail in error, but may sue them upon their recognizance. *Perkins v. Pettit*, 2 *B. & P.* 440.

But it will be obvious to the practitioner, that where bail has been put in upon which the defendant in error obtains a rule for better bail, and procures the writ of error to be *non-prossed* for want of justification, the bail already put in are as no bail, and the original plaintiff cannot proceed against them. *Gould v. Holmstrom*, 3 *Smith*, 573.

It appears by a note of the reporter, that the court had previously, in this case, decided *contra*, upon the authority of former cases; although having some doubts, the case cited was argued again, and decided as above.

Neither were they held entitled to be discharged where the bail was put in in vacation, and excepted to, and the plaintiff in error gave notice that they would justify on the first day of next term, and before that day *non-prossed* his own writ of error, and the bail did not justify. *Dickenson, executrix of Hunt v. Heseltine*, 2 *M. & S.* 210.

III. OF PROCEEDINGS IN ERROR SUBSEQUENT TO BAIL AMENDMENT. MOTION TO QUASH.

The next step is usually taken by the defendant in error. Immediately following the putting in and perfecting bail by the plaintiff in error, if bail shall have been necessary, and if not, the same step is to be taken on the return of the writ of error, the defendant in error applies for a rule to certify the record. See title CERTIFY THE RECORD. *Rule to certify the record, ante, page*

338. If not done within the time specified by the rule, *i. e.* within eight days after the service thereof, the defendant in error may *non pros* the writ of error. *Goodright v. Hugoson, Ca. temp. Hardw. 351, 2.*

Rule to certify the record.

Only a transcript of the record is removed, although the record itself is supposed to be removed, except in the case of a fine, the record of which always remained, and only a transcript was removed, *Dyer, 89, b.* And in error from C. P. only the body of the record is certified, for the original and judicial writs remain with the *custos brevium* and officers, and are never certified but when error is assigned for want of them. *Robsert v. Andrews, Cro. Eliz. 84.*

What is removed or certified.

On the transcript being returned and filed, the plaintiff in error may in the court above move to amend the writ of error, which, since stat. 5 G. I. c. 13. may be done without costs. *Gardner v. Merret, 2 Ld. Raym. 1587.* By the above statute, all writs of error wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record by the respective courts where such writ of error shall be returnable. The court of K. B. will amend a writ of error brought in case, where it appeared by the transcript, that the original action was brought in covenant. *Sampayo v. Payba, 5 Taunt. 82.* Where judgment is signed in a term subsequent to that in which the writ of error was returnable, it is a fault not amendable by the statute. *Wright v. Canning, 2 Ld. Raym. 1531,* but see *Verelst v. Rafael, Cowp. 425.* As to the application of the above statute to amendments of writs of error, and as will be seen presently, the defendant in error will be made to pay the costs of quashing it.

In what, and when, writ of error amended, or not.

And if brought by a *feme covert*, without joining the husband, amendment not allowed unless affidavit made that he concurs. *Binns and Wife v. Pratt and Another, 1 Chit. R. 369.*

At this period also, namely, on the transcript being returned, the defendant in error may move to quash the writ of error, and such an application should be made either to the court of Chancery from whence it issues, or to the court wherein it is returnable. *Lloyd, qui tam, &c. v. Skutt, Dougl. 350;* and it is intimated by the learned reporter, that the court of Chancery being moved, refused to entertain the question, and therefore it may seem that the application should be made in the first instance to the court in which the writ of error is returnable. Note subjoined to the above case.

When motion made, and in what court, to quash writ of error.

The defendant in error may move to quash the writ for some fault or defect that is not amendable by the statute 5 G. I. c. 13. and where there are several parties who are aggrieved by a judgment, and the writ is brought by some or one of them only, it will be quashed; but where one of several parties to a judgment who is not aggrieved by it, joins in bringing a writ of error, it may be amended by striking out his name, and it will stand good for the other parties. *Verelst v. Rafael, Cowp. 425.* Where a writ of error was brought on two judgments, it was on sufficient grounds quashed as to one, and remained good as to the other. *Burr v. Atwood, 1 Ld. Raym. 328.*

The grounds of quashing a writ of error.

Of costs on
quashing.
Stat. 4 Ann. c. 16.
s. 25.

By statute 4 Ann. c. 16. s. 25. "upon quashing any writ of error for variance from the original record or other defect, the defendant in error shall recover against the plaintiff issuing out such writ, his costs as he should have had if judgment had been affirmed, and to be recovered in the same manner." But it seems that costs are payable in all cases, on quashing a writ of error, even though none were recoverable in the court below. *Archbishop of Dublin v. Dean of Dublin*, 1 *Str.* 262. *Ratcliff v. Burton*, *Ca. temp. Hardw.* 135. But the operation of this statute must be understood to be limited; for where the writ of error is quashed by reason of the defendant in error having entered continuances on the roll until the term subsequent to the return of the writ of error, and as it appeared on purpose to defeat it, then signing judgment, the defendant is liable to pay the costs. *Rejindoz v. Randolph*, 2 *Str.* 834. See also *Gould v. Coulthurst*, 1 *Str.* 139.

Where set aside.

Where writ of error may be set aside, see *Badely v. Shafto*, 8 *Taunt.* 434, cited page 611, *ante*.

IV. ABATEMENT IN ERROR.

Where it abates
or not.

At this period also, namely, after the transcript has been returned and filed, the writ of error may abate. Some practical cases are collected under title ABATEMENT of *Writ of Error*, page 6, *ante*. Where the writ of error abates by reason of the death of the plaintiff in error, or of one of several plaintiffs in error, as mentioned under the above title, it has been said that the defendant in error must sue out a *scire facias quare executionem non*, against the executors in the former case, and the survivors in the latter, to revive the judgment before he can sue out execution; for though in the latter case, the death of one of the plaintiffs in error would have made no alteration of the record, if no writ of error had been sued out, because the executor of the deceased would not be liable to a *fieri facias* or *capias ad satisfaciendum*, though he would to an *elegit*, yet a writ of error is a *supersedeas* which continues until the court is apprized of the abatement of the writ by a *scire facias*, 2 *Saund.* 101, *o. n.* and the authorities there cited. And where in error in parliament on judgment in B. R. plaintiff in error died in vacation, and the defendant in error sued out execution tested in the term preceding, it was held irregular; because at the *teste* of the writ, error was depending, and execution could not be taken out in that case without leave. So where in the next term after the original defendant died, the plaintiff moved for leave to sue out execution tested of the term preceding, it was refused, because the error must appear upon the record. *Lord Kinnaird v. Lyall*, 3 *Smith*, 280. 7 *East*, 296. S. C. But it has been expressly ruled, that the stat. 8 & 9 W. III. c. 11. s. 7, applies to writs of error; and that therefore a writ of error does not abate by the death of one of several plaintiffs in error. *Clarke v. Rippon*, 1 *B. & A.* 586.

If the plaintiff in error die after errors assigned, the writ, as mentioned page 6, *ante*, does not abate; but the defendant may join in error and proceed to have the judgment affirmed, if not erroneous, and where there was only one plaintiff in error, must afterwards revive it against his executors, *ib.* and a writ of error

does in no case abate by the death of the defendant in error, whether before or after errors assigned, 3 *Smith*, 280; or of one of several defendants in error; but his death being suggested on the roll, the writ of error proceeds against the survivors. See a precedent for such suggestion, *FORMS* subjoined, *ib.*

Where the defendant dies before the assignment of errors, and the plaintiff will not assign them, the executors of the defendant in error, or the surviving defendant, may have a *scire facias quare executionem non*, to compel him, *ib.* *Wicket v. Creamer*, 1 *Salk.* 264; or if he die after assigning errors, the executors or surviving defendants must proceed as if the defendant were living, till judgment be affirmed, and then, if there were only one defendant in error, his executors must revive it by *scire facias*; and execution cannot be taken out pending the writ of error. 2 *Saund.* 101. o. n.

Of death affecting error in other cases.

Where the defendant dies, a writ of *scire facias ad audiendum errores* goes against his executors or administrators. Sir H. Thyn and Corie, mentioned Anon. 1 *Vent.* 34. *Wicket v. Creamer*, 1 *Salk.* 264. and this generally, according to Doddridge, J. as the safer and better way; though the precedents were stated to be both ways. *Huxley v. Harrison*, 2 *Bulst.* 230, 1.

It may also be observed, in addition to title *AMENDMENT*, that if the return be signed by the chief justice, the writ does not abate, but the record may be certified afterwards. *Allen v. Shaw*, 1 *Sid.* 268.

It seems clear, that writs of error in parliament do not abate by reason of prorogation or dissolution. See Sir T. Raym. 383, 4. *Com. Dig.* tit. *Parliament*, (p. 2.)

Where error not abated by prorogation.

V. OF THE PERIOD FOR ASSIGNMENT OF ERRORS, AND ALLEGING DIMINUTION. CERTIORARI. QUARE EXECUTIONEM NON, IN ERROR FROM C. P. TO K. B.

The next step taken by the plaintiff in error, is to assign errors.

In practice in the different courts, the rule for certifying the record, the rule for alleging diminution, and the rule for assigning errors, are steps taken at different periods of the proceeding in error. Thus, the plaintiff in error from K. B. to Exchequer Chamber, being ruled to allege diminution of the record, the transcript whereof is already returned or carried over in virtue of the rule for certifying the record, may allege diminution thereof, namely, an incomplete or imperfect record returned and filed. The plaintiff in error may then issue a *certiorari*, in consequence of which the record may be wholly certified; after this such plaintiff may assign other errors, I apprehend of his own accord, or he may be ruled to do so, and then he will be permitted to assign such errors in fact or at law, as he may be advised. See title *DIMINUTION*. If such plaintiff allege diminution in the record carried over, he issues the writ of *certiorari*. See title *CERTIORARI in error*. If the plaintiff in error do not allege diminution, or if he do and issue the *certiorari*, that writ must be returned, and then, and not till then, can he be compelled to assign errors.

Of the assignment of errors. Alleging diminution.

As to certiorari in error.

ERROR; V. VI. *Assignment of Error on part of Plaintiff.*

It is a rule, that a man cannot allege diminution contrary to the record which is certified, as if on a writ of error it be certified that the judgment was that the defendant should be *in misericordia*, the defendant in error cannot allege for diminution, that the record is *quod capiatur*, because this is contrary to the record certified. *Rowe v. Power*, in Error, *Dom. Proc. die Mart.* 8 Mar. 1803. 2 *Tidd*, 1212.

After conviction and judgment, at the sessions, the court will not grant a *certiorari* to remove the proceedings for the purpose of having an indictment quashed, on motion, for error on the record. *Rex v. The Inhabitants of Penegoes and Machynlleth*, 2 *D. & R.* 209.

The whole record, therefore, being removed, and before the court of error, the plaintiff should proceed to assign errors therein. The rule for alleging diminution on the coming in of the transcript, is peculiar to error from K. B. to the Exchequer Chamber. In error from C. P. to K. B. the defendant in error, instead of the rules to allege diminution and to assign errors, issues a *scire facias quare executionem non*, which with an *alias* is to be returned *nihil*, and then execution may issue against the plaintiff in error; unless he in due time, *i. e.* within the time allowed by the rule on the *sci. fa.* with which he is to be served, shall have assigned errors, or shall have alleged diminution by way of assigning errors; and where such writ may be issued, although the transcript shall not have been delivered and filed. See title *CERTIORARI*, *ante*; and *Branscomb v. Hughes*, 15 *East*, 646.

As to what may or may not be alleged for diminution, see titles *CERTIORARI*, *in error*; *DIMINUTION*, *ante*.

Of the *quare executionem non* in error from C. P.

VI. OF ASSIGNMENT OF ERRORS ON THE PART OF PLAINTIFF IN ERROR. THE LIKE ON THE PART OF DEFENDANT IN ERROR. PLEADING IN ERROR.

On the part of the plaintiff.

Having, with reference to the court in which error is brought, determined upon whether to take out a rule to assign errors, or to issue a writ of *scire facias quare executionem non*, it seems next material to insert the practical cases as to assignment of errors, on the part of the plaintiff in error.

Where bill of exceptions waived.

It may be presumed, that if a party who, at the trial of a cause, has tendered a bill of exceptions, bring a writ of error before he has procured the judge's signature to the bill of exceptions, he thereby waives the bill of exceptions, and will not be permitted by the court of error afterwards to append the bill of exceptions to the writ of error. *Dillon v. Doe*, *d. Parker*, 1 *Bing.* 17.

An error may be assigned in fact or at law; *e. g.* that being under age, the defendant in the original action appeared by attorney; but where judgment of nonsuit has been given in an action brought against an infant, it is no ground of error that the infant had appeared by attorney. *Bird v. Pegg and Another*, 5 *B. & A.* 418. So coverture in plaintiff or defendant at the time of commencing the action is assignable for error; so that the plaintiff or defen-

dant died before verdict or interlocutory judgment; these are errors in fact, and the assignment of them must conclude with a *verification*. *Sheepshanks v. Lucas*, 1 *Burr.* 410; and it is to be observed, that only one error in fact can be assigned. *F. N. B.* 45; nor can error in fact and error in law together be assigned, for they are distinct things and require different trials. *Burdett v. Wheatley*, 2 *Ld. Raym.* 883. 2 *Bac. Abr.* 217. *Davie v. Franklin*, *H.* 26 G. III. K. B. 2 *Tidd*, 1220.

If an error in fact be assigned, that is not assignable, or be ill assigned, *in nullo est erratum* is no confession of it, but shall be taken only for a demurrer. *Id. ib.*

Errors in law are common or special; that the declaration is insufficient in law to maintain the action, that the judgment was given for the plaintiff instead of the defendant, or for the defendant instead of the plaintiff, are the common errors assigned in law; and of errors in law common or special, many errors may be assigned.

The want of an original writ, bill, or warrant of attorney; or other matter appearing on the face of the record which shews the judgment to have been erroneous, are special errors. But it seems to be a general rule that nothing can be assigned for error that contradicts the record, or that was for the advantage of the party assigning it; or that is aided by appearance; or by advantage not being taken in due time; nor can a man assign that for error which he might have pleaded in abatement; nor where he has pleaded it in bar to an action, as coverture. 2 *Saund.* 101. *q. n.* and the numerous authorities there cited, and *Bac. Abr.* 487. 490. Nor where, having executed a bond, describing himself as T. B. of C. in the county of N. esq. and being outlawed by such description, can he assign for error, that he was not properly described in the writ "*of a town, hamlet, or place,*" within the words of the statute of additions, 1 *Hen. V. c. 5.* *Bonner v. Wilkinson*, 1 *D. & R.* 328. And where the assignment of errors has been merely calculated for delay, the court have in some instances set it aside. *Chartres v. Cusaick*, 1 *Str.* 141. *Moor v. Goodright*, 2 *Str.* 899. *Lil. Ent.* 228, *in marg.*

Stat. 18 *Eliz. c. 14*, aids the want of an original after verdict, and also by an equitable extension the want of a bill upon the file, *Wilson's Case*, *Hob.* 130; but not after judgment by default or confession, 4 *Ann. c. 16. s. 2*; or upon demurrer or *nul tiel record*. In order to supply these defects, a petition must be presented to the Master of the Rolls. See title CERTIFY THE RECORD. *Rule to certify the record*, and the Practical Directions and Forms subjoined thereto.

In K. B. in error from C. P. after assignment of errors, the plaintiff may have a *scire facias ad audiendum errores*. The Exchequer Chamber doth not award this writ, but notice is given to the parties concerned, 2 *Bac. Abr.* 473; and in K. B. the writ is rendered wholly unnecessary in practice by the party taking notice of the assignment of errors voluntarily, and pleading *in nullo est erratum*. *Moseley v. Cocks*, *Carth.* 41. See sect. 1. of this title.

Proceedings on part of defendant.

In nullo est erratum is either plea, demurrer, or joinder in error.

The assignment of errors being in the nature of a declaration, 2 *Saund.* 101. *p. n.* the defendant in error may plead or demur thereto. The plea is either common, such as that of *in nullo est erratum*, and this is also called a joinder in error; in certain cases joinder in these terms may be deemed a demurrer. The example however to be found in a work of high authority, 2 *Bac. Abr.* 488, is wrong, for it is said that if the plaintiff in error assigns an error in fact, viz. that the defendant who was an infant, did not appear by guardian, but by attorney, and concludes with *hoc paratus est verificare*, instead of concluding to the country as he ought to do, though the defendant in error pleads *in nullo est erratum*, it shall not amount to a confession, but shall be taken only for a demurrer; yet it appears that the conclusion with an averment is right where an error in fact is assigned in order to give an opportunity of trying the fact by the country, if the defendant in error choose it. *Sheepshanks v. Lucas*, 1 *Burr.* 412. *Walker v. Stokoe*, *Carth.* 367. But it is properly said, that the plea *in nullo est erratum* is itself in the nature of a demurrer, and at once refers the matter of law arising thereon to the judgment of the court. 2 *Tidd*, 1220. See also *Rol. Abr.* 763. (K.) *pl.* 4. *Bro. Error*, 93; as when an error in fact, that is not assignable, be assigned, and *in nullo est erratum* be pleaded, it is no confession, but a demurrer, 2 *Bac. Abr.* 488. If, however, an error in fact be well assigned, and the defendant in error would put in issue the truth of it, he ought to deny the fact and join issue on it, and have it tried by the country; and not say *in nullo est erratum*: for by so doing he acknowledges the fact to be true, 1 *Rol. Abr.* 763. (K.) *pl.* 2. And after *nullo est erratum* pleaded, no diminution can be alleged, *ib.* 764, *pl.* 5. *Bro. Error*, 93. *Robert v. Andrews*, *Cro. Eliz.* 84.

If the plaintiff in error assign error in fact and error in law, which are not assignable together, and the defendant in error plead *in nullo est erratum*; this is a confession of the error in fact, and the judgment must be reversed; for he should have demurred for the duplicity. 2 *Bac. Abr.* 487. but no admission of the party, whether before or after errors assigned, can or ought to restrain the court from looking into the record before them, and therefore even after *in nullo est erratum* pleaded, the court *ex officio*, as before observed, may award a *certiorari*.

The practitioner will have gathered the general effect of the usual plea *in nullo est erratum* to an assignment of errors; and his time to advert to what special matters may be pleaded to such assignment.

These may confess and avoid the error assigned, but may allege a release of all errors, or of all suits. *Bac. Abr.* 497. and such release contained in a warrant of attorney to confess a judgment, is good, though given before judgment, provided the release be dated in the term of which the judgment is entered up. *London v. Pickering*, 2 *Stra.* 1215. but where there are several plaintiffs, the release of one of them shall not bar the others. *Ruddock's Case*, 6 *Rep.* 25. *a.* And in pleading a release, the defendant must lay a *venire*; but though it be ill pleaded, yet if there are

As to special pleas to the assignment of errors.

no errors, the court will affirm the judgment. 2 *Bac. Abr.* 497, *n.* Or he may plead the 10 & 11 *W. III.* that the writ of error was not brought within twenty years after the signing the judgment. *Street v. Hopkinson*, 2 *Str.* 1055; and this statute must be pleaded, because it contains a clause for saving of the rights of infants, &c. and it must conclude, as well as that of a release of errors, with praying that the plaintiff may be barred of his writ of error. 2 *Bac. Abr.* 499. To the special plea the plaintiff in error may reply or demur, and proceed to trial or argument, and the court of error may award a *venire*.

It is mentioned before, that special matter of law already apparent on the record, needs not be especially assigned for error. See the previous section.

VII. OF THE ISSUE IN ERROR. ENTRY OF PROCEEDINGS ON THE ROLL WHERE ON A DIFFERENT ROLL. OF THE TRIAL OF AN ISSUE IN FACT.

The next consideration is the *issue in error*, joined as is before observed, or by the defendant's denial of the fact assigned for error, and so putting it in issue: or by the plaintiff's replication to the special plea of the defendant in error putting the matter of fact of that plea in issue.

The proceedings are then entered on the roll or of record. In error from C. P. to K. B. the entry is made on a roll different from that on which the judgment was entered. *Holdlipp v. Otway*, 2 *Saund.* 102. On a writ of error *coram nobis*, the proceedings in error are entered on the same roll on which the original judgment or former writ of error was entered, otherwise the whole would be discontinued, though after verdict. *Yates v. Windham*, *Cro. Eliz.* 155. 281. *Walker v. Stokoe*, 1 *Ld. Raym.* 151. *S. C. Carth.* 369.

Of the entry of the proceedings on the roll.

The trial of an issue in fact on a writ of error appears to be of very rare occurrence, and the particular steps to be taken in relation to such trial, are not different from those which occur on the award of a new *venire* in a common case; the court of error having power, as observed before, to award one. After the plea or replication by which the matter of fact will be put in issue, proper continuances down to the period of trial, will of course be entered, and also an award of the *venire*.

Of the trial of error in fact.

VIII. OF THE JUDGMENT IN ERROR.

The next point in due course occurring for consideration is the judgment in error.

If it be for the plaintiff in error, the judgment, *in case the error be in fact*, is, that the judgment (in the original action) be recalled, 1 *Roll. Abr.* 805; *pl.* 9; in case the error be in law, that the judgment be reversed. 2 *Bac. Abr.* 503.

Of the judgment in error, reversed or affirmed.

If it be for the defendant in error, he being the original plaintiff in the cause, the common judgment in error is, that the judgment be affirmed; and this is the language of such judgment in error, whether the errors assigned shall have been in fact or in

ERROR; VIII. *Of the Judgment in Error.*

law. But on a plea of release of errors found for the defendant in error, the judgment is, that the plaintiff be barred of his writ of error; and not that the judgment be affirmed. So also where the statute of limitation of error is pleaded. *Street v. Hopkinson, Cas. temp. Hardw.* 345.

A judgment being an entire thing, cannot regularly be reversed in part and affirmed for the residue. 2 *Bac. Abr.* 500; and in like manner if a man recover in debt upon a judgment, if the first judgment be reversed, the second judgment shall also be reversed. *Ib.* 501.

So, where a judgment consists of distinct parts, one part may be affirmed, and the other part reversed. *Frederick v. Lookup, 4 Burr.* 2018. In this case the judgment as to the costs was reversed. But it is said, that where costs are merely accessory to the principal judgment, there, if they are erroneously given, the judgment cannot be reversed as to that only, but must be reversed *in toto*. 2 *Bac. Abr.* 503. *Rous v. Etherington, 2 Ld. Raym.* 870; but see *Green v. Waller, Ib.* 891.

A distinction may present itself as to the judgment where the plaintiff in the original action is the defendant in error. In that case, if the judgment in error be also against the original plaintiff, such judgment shall only be to reverse the former judgment; for the writ of error is brought only to be eased and discharged from that judgment; but if the judgment shall have been given for the original defendant, and the original plaintiff in the cause bring error which shall be determined for him, the judgment in error is not only that the original judgment be reversed; but the court shall also give such judgment as the court below should have given. See *Parker v. Harris, 1 Salk.* 262. And where judgment for the defendant on a special verdict is reversed in the Exchequer Chamber, that court will, on motion, give a final judgment for the plaintiff. *Den, d. Mellor v. Moore, 1 B. & P.* 30. recognized *Clements v. Waller, 4 Burr.* 2156. On the reversal of a judgment for a defendant, a new judgment shall be given for the plaintiff, if he appears to have any cause of action. *Phillips v. Bury, 1 Ld. Raym.* 5. S. C. 1 *Salk.* 403. and it may be deemed decided, that the courts above may give a new judgment for the plaintiff to recover his damages; but where the damages are not assessed, as when judgment was given on demurrer, the Exchequer Chamber or House of Lords not having the record before them, but only a transcript, cannot give a new and complete judgment, but only an interlocutory one, *quod recuperit*; and the transcript being remitted, K. B. will award a writ of inquiry and give final judgment. S. C. *Carth.* 319. 2 *Saund.* 101, *v. n.*

As to the judgment on one of different counts for the plaintiff, and on another for the defendant, it has been determined, that if judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for the defendant on another, and the defendant bring a writ of error to reverse the judgment on the first count, the court of error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record. *Campbell v. French, 6 T. R.* 200. And it seems that after an award of a writ of inquiry of damages, if final judg-

ment be given for a certain sum, with the plaintiff's assent, it is no cause of error, although the record contain no entry of any inquisition executed. *Gould v. Hammersley*, in error, in the Exchequer Chamber, 4 *Taunt.* 148.

Upon error assigned of a misnomer of the christian name of one of the plaintiffs below, in the warrants of attorney, the court of Exchequer Chamber held it to be immaterial, and they also allowed the transcript of the record to be amended, before amendment in the court below, where there had been no verdict and judgment entered in the *Nisi Prius* record and judgment-roll upon a plea of set-off. *De Tastet v. Rucker and Others* (in error), 5 *J. B. Moore*, 135.

Where amendment of transcript allowed.

IX. OF COSTS IN ERROR. OF INTEREST.

Where a judgment is reversed, each party must pay his own costs. *Wyvil v. Stapleton*, 1 *Str.* 617. The following statutes are silent where the judgment is reversed, 2 *Saund.* 101, *x. n.*

By stat. 3 *H. VII. c.* 10. if any defendant or tenant against whom judgment is given, or any other that shall be bound by the said judgment sue, before execution had, any writ of error to reverse any such judgment, in delay of execution, that then, if the same judgment be affirmed, or the writ of error be discontinued in default of the party, or the plaintiff in error be nonsuited therein, the person or persons against whom the writ of error is sued, shall recover his costs and damages for his delay and wrongful vexation in the same, by the discretion of the justice before whom the writ of error is sued. In the case of *Pearson v. Iles*, 1 *Doug.* 556. *n. 5.* 561. it is observed by the learned reporter, that the word "justice" in the singular number is, without the possibility of a doubt, made use of for the court, and that there is no court of error consisting only of one judge. The statute 19 *H. VII. c.* 20. recites the above act; but it seems to have escaped the learned reporter, that this act states and recites the word in the former act to have been "justices," and enacts, that it shall be thenceforth duly put in execution; and in a late case the court said, "by the discretion of the justice, *i. e.* the court afore whom the writ of error is sued." *Salt v. Richards*, 3 *Smith*, 121; and in the same case it was decided, that where a writ of error is nonprossed for want of a transcript, the defendant in error is not entitled to costs under the statute 3 *H. VII. c.* 10. See also *Milborn v. Copeland*, 1 *M. & S.* 104.

Statutes,
3 *H. VII. c.* 10.

Stat. 19 *H. VII.*
c. 20.

These statutes do not extend to a writ of error sued out after execution served, *Gilb. C. P.* 275; but costs are recoverable in every case of error brought before execution executed. *Ferguson v. Rawlinson*, *And.* 113. This last over-ruled many prior cases; and *Lee, C. J.* said, that the case of *Foot v. Berkly*, 1 *Vent.* 88, might be considered in a different light from the others (those over-ruled), upon a very strict construction of the statute; so that it may hardly be said that case was over-ruled by the decision in *Andrews*, as it is stated to have been, 2 *Saund.* 101. *w. n.* And in the affirmance of a judgment after *devastavit*, the court held that an ex-

Cases.

ecutor ought to pay costs. *Caswell v. Norman*, 2 *Str.* 977; and in *Williams v. Rily*, it was held, that executors and administrators are liable to costs in error, in cases where they would be liable in the original action. 1 *H. Bla.* 566. See also *Caswell v. Norman*, *E.* 2 *G.* II. B. R. there more fully cited than in *Strange, n.* The court of Ex. Ch. is bound to allow double costs to the defendant in error on the affirmance of a judgment in the K. B.; but it is entirely a matter in their discretion, whether or not interest shall be allowed on such affirmance. *Shepherd v. Mackreth*, 2 *H. Bl.* 284. In the House of Lords they give sometimes very large, sometimes very small costs, in their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below; and it is understood to be the practice, that in order to lessen the costs the plaintiff will withdraw his errors. But where errors are argued in the House of Lords, without having been argued below, and judgment is affirmed, though the alleged errors may be well worthy of consideration, the plaintiff in error must pay the costs of the proceedings as if the case had not been argued at all in that house. *Doran v. O'Reilly*, 5 *Dow*, 233. And unless the costs of the proceedings in error in Parliament be there given, the party seems without remedy for them, since the court below, to which the record is remitted, has no power to give them. See *Beale v. Thompson*, 2 *M. & S.* 249.

Where plaintiff
must pay costs.

Statute 13 C. II.
st. 2. c. 2. s. 10.

By stat. 13 *Car.* II. st. 2. c. 2. s. 10. if any person shall sue or prosecute any writ of error for reversal of any judgment given after verdict, and the said judgment shall afterwards be affirmed, every such person shall pay unto the defendant in the said writ of error, double costs, to be assessed by the court where such writ of error shall be depending, for the delaying execution.

Stat. 8 & 9 W. III.
c. 11. s. 2.

By stat. 8 & 9 *W.* III. c. 11. s. 2. if any person shall commence or prosecute, in any court of record, any action, plaint, or suit, wherein, upon any demurrer, either by plaintiff or defendant, demandant or tenant, judgment shall be given by the court against such plaintiff or demandant, or if, at any time after judgment given for the demandant in any action, plaint, or suit, the plaintiff or defendant shall sue any writ of error to annul the said judgment, and the said judgment shall be afterwards affirmed, the writ of error discontinued, or the plaintiff be nonsuit thereon, the defendant in error shall have judgment to recover his costs against the plaintiff or demandant, and have execution for the same, by *capias ad satisfaciendum, fieri facias, or elegit.*

Avowant cannot
have costs on this
statute.

An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to his costs on this statute, which is confined to judgments for defendants on demurrer. *Golding v. Dias*, 10 *East*, 2.

Of costs on re-
versal.

A judgment for the plaintiff was reversed on a writ of error in fact, brought by the defendant, and the court held, that the plaintiff in error was entitled to the costs of the original action, though not to the costs in error. *Per Cur. H.* 40 *G.* III. K. B. 2 *Tidd*, 1234.

If amendment be made after error brought, and before final judgment, or the plaintiff proceed after notice thereof, he shall not be allowed his costs. *Lloyd v. Skutt*, *T. 23 G. III. K. B. 2 Tidd*, 748.

Where plaintiff in error not allowed costs.

Judgment for plaintiff in error from an inferior court, and that it might be referred to the master to tax the plaintiff his costs, where the defendant had not joined in error, in compliance with the usual side-bar rule, can only be obtained on motion. *Swift v. Bottom*, *1 D. & R.* 183.

Where motion necessary for judgment after error brought.

It has been seen, that damages and costs shall be given in error for delay of execution, although none were recoverable in the first action. *Graves v. Short*, *Cro. Eliz.* 617. And on error returnable in K. B. that court will, on motion, order the master to compute interest on the sum recovered, by way of damages, from the day of signing final judgment below, down to the time of affirmance, and to add the same to the costs taxed for the plaintiff in the original action. *2 Saund.* 101, *w. n.* and the authorities there cited, particularly *Zinck v. Langton*, *Dougl.* 752, *n. 3.* and *Entwistle v. Shepherd*, *2 T. R.* 78. In a reference from the above note on the case of *Zinck v. Langton*, it is observed by the late learned reporter, that if, by the course of the court of error, interest is not computed in the allowance of costs on the affirmance of the judgment, the jury may give interest by way of damages, from the time of signing the original judgment. *Entwistle v. Shepherd*, *2 T. R.* 78. And the Exchequer Chamber does not, in the ordinary exercise of its discretion, give interest upon the evidence of affidavits, but only on that which appears on the record. *Doran v. O'Reilly*, [printed as Anonymous], *7 Taunt.* 244. But an avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered by force of the statute *3 H. VII. c. 10*, which is confined to judgments recovered by plaintiffs below, and affirmed on a writ of error. *Golding v. Dias*, *10 East*, 2. But in debt on recognizance against bail in error, in Ex. Ch. the bail are not liable to pay interest between the time of the original judgment and the affirmance. *Frith v. Leroux*, *2 T. R.* 57. 59. and *n. (a)*. And the court decided, that the bail were liable only for the interest subsequent to the time of affirming the judgment; and also that the case of *White v. the Duke of Newcastle*, went by surprise. See also *Welford v. Davison*, *4 Burr.* 2127. *Anon.* *4 Taunt.* 722. In the Ex. Ch. where interest was denied generally, the recognizance being in K. B. the court remarking the difference between the recognizance in that court and in C. P.; that in K. B. being confined to the amount of the debt. In the court of Ex. Ch. it is a matter entirely in the discretion of the court, to allow interest on the affirmance. *Shepherd v. Mackreth*, *2 H. Bl.* 284. As to where it was allowed in error brought upon a judgment in an action of trover for certain bills of exchange, see *Atkins v. Wheeler*, *2 New R.* 205; and also on a contract to make good to the acceptor of a bill, so much money as the dividends of a bankrupt's estate should fall short of the amount of the bill. *Furlonge*

Of interest in error.

v. Rucker, in error, in the Exchequer Chamber, 4 *Taunt.* 250. Also on a balance on a merchant's account, and for interest on that balance. *Hammel v. Abel*, *Id.* 298. And although not allowed on mere money lent; but it was allowed for balance of account and money lent, and for interest upon the advances, where the plaintiffs, as bankers, have been in the habit of charging it. *Gwyn v. Godby*, in error, in the Exchequer Chamber, *Id.* 346. So also where goods were to be paid for by a bill which was not given, from the time the bill would have become due. *Middleton v. Gill*, *Id.* 298. So also on an affirmance of a judgment on a promise to give a mortgage. *Anon.* in the Exchequer Chamber, *Id.* 876. So also for the proceeds of stock fraudulently sold out. *Mitchell v. Minikin*, 6 *Taunt.* 117. But upon a contract to replace stock, and pay dividends in the mean time, though the jury give damages for the value of the stock and the amount of the dividends, yet upon affirmance in error of the judgment, the measure of increase that may have accrued, is not the further dividends that may have accrued, but interest on the damages given as the value of the capital stock. *Dwyer v. Gurry and Others*, 7 *Taunt.* 14. So also on an attorney's undertaking to pay debt and costs on a day certain. — *v. Edmunds*, 6 *Taunt.* 346. But it was refused, where in covenant on a charter-party, the plaintiff assigned two breaches, one for a specific sum, the other for unliquidated damages; on judgment by default, damages are assessed generally. *Martin v. Emmote*, Ex. Ch. in error, 2 *Marsh.* 230. 6 *Taunt.* 530. S. C. And upon the affirmance of a judgment for the plaintiff, in an action upon an attorney's bill, they will not allow interest. *Walker v. Bayley*, 2 *B. & P.* 219. But this court will allow interest to a defendant in error, under stat. 3 *H. VII.* c. 10. on a judgment of *non pros*, as well as on a judgment of affirmance. *Sykes v. Harrison*, 1 *B. & P.* 29. but not where the original debt carried no interest, unless it distinctly be proved or admitted that the writ of error were brought for delay. *Saxelby v. Moor*, 3 *Taunt.* 51. Nor where judgment is entered generally upon a declaration in *assumpsit*, some of the accounts whereof are for unliquidated damages. *Powell v. Saunders*, 5 *Taunt.* 28. And *semb.* that a judgment on a count for not accounting for goods delivered to sell on commission, will not bear an interest on affirmance in error. *Id. ib.* And interest refused on affirmance in error of a judgment in an action on a judgment of a court in Jamaica, in an action for goods sold and delivered, and interest on the price of the goods. *Doran v. O'Reilly* [printed as Anonymous], 7 *Taunt.* 244.

Where denied on affirmance of judgment in Jamaica.

So where the judgment in the court below was in an action on an account stated, and for interest on the balances. *Id. ib.* In the court holden before the lord chancellor and treasurer and judges, under stat. 31 *E. III.* for examining erroneous judgments in the Exchequer, the practice is to give interest from the day of signing the judgment to the day of affirming it there, computed according to the current, not according to the strictly legal rate of interest. *Bodily v. Bellamy*, 2 *Burr.* 1094. See also *Anon.* 4 *Taunt.* 30.

The sum now allowed, at least in the court of Ex. Ch. is, I believe, 4l. per cent.

X. OF EXECUTION IN ERROR.

The sum for which execution is to be taken out, may include the sum recovered in the original action, as well as the damages and costs in error, or for these alone by *feri facias*, *elegit*, or *capias ad satisfaciendum*. 2 Saund. 101. n. x. and also by *levari facias*, which is, indeed, in the nature of a writ of *feri facias*.

Judgments must be executed in those courts in which they are given. Bac. Abr. 721. See also *Vicars v. Haydon*, 2 Cowp. 843. And where a writ of error determines in the Ex. Ch. by abatement or discontinuance, the judgment is not again in B. R. till there be a *remittitur* entered; or without a *remittitur* it cannot appear to the court but that the writ of error is still pending in the Ex. Ch. Howard v. Pitt, 1 Salk. 261. and if the writ of error abate by motion, it is said to be usual for the plaintiff to move the court on an affidavit of the fact, for leave to enter a *remittitur* and take out execution. Giggeer's Case, *ib.* 264. So if the plaintiff recover a judgment against two defendants in B. R. and one of them bring error in Ex. Ch. the plaintiff cannot charge the other defendant in execution till the record be remitted into B. R. notwithstanding the writ of error might have been quashed immediately, because not brought by both defendants. Laroche v. Wasbrugh, 2 T. R. 737. But where the judgment is affirmed on a writ of error, *coram nobis*, or from C. P. or an inferior court, returnable in K. B. the execution may issue immediately out of that court; for the record remains there, or is supposed to be removed thither. *Vicars v. Haydon*, Cowp. 843. This was not indeed the precise point in this case, but Lord Mansfield, C. J. said, that upon a writ of error to the House of Lords from K. B. a transcript only goes up, and the record is supposed to be sent back again to K. B. and if the judgment is affirmed, K. B. may award execution, and that on a writ of error from C. P. though transcript only is removed, K. B. may award execution. Cowperthwaite v. Owen, 3 T. R. 657.

By what court execution issued.

XI. OF RESTITUTION TO THE PARTY.

It seems material to inquire, to what the parties shall be restored on the reversal of the judgment; and it appears, that if a man recover damages, and hath execution by *feri facias*, and upon the *feri facias* the sheriff sells to a stranger for a term of years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself. 2 Bac. Abr. 505. But it also appears, *ubi supra*, that if the goods of an outlawed man are sold by the sheriff upon a *capias ullaatum*, and after the outlawry is reversed by writ of error, he shall be restored to the goods themselves.

Of restitution on reversal.

Subject to this state of the case, as influenced by a change of certain property under certain circumstances, the decision in

Sympton v. Jucon, Cro. Jac. 699, must, it is presumed, be taken, which says, that the plaintiff in error, after the reversal, is to be restored to *all* that he lost, and what the plaintiff on the judgment, by colour thereof, had taken after the judgment. In certain cases also, a *scire facias* must be sued, but the following case sufficiently ascertains what those cases are. Where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed, there because it appears on the record that the money is paid, the party shall have restitution without a *scire facias*; and there is a certainty of what was lost, otherwise where it was levied but not paid, there must then be a *scire facias* suggesting the matter of fact, *viz.* the sum levied, &c. *Anon. 2 Salk. 588*. But where personal goods are delivered to the party *per rationabile pretium & extentum*, upon the reversal of the judgment, he shall be restored to the goods themselves. *Rol. Abr. 778*. And it seems that a collateral judgment shall not be reversed, although the principal one be, for if, after judgment in a *scire facias* against bail, the judgment against the principal is reversed, this is no reversal of the judgment against the bail. *2 Bac. Abr. 506*; but they may be relieved by *audita querela*.

XII. PRACTICAL DIRECTIONS,

IN ERROR FROM K. B. TO EXCHEQUER CHAMBER.

- Who, plaintiff and defendant in error.** *The party suing out the writ of error, whether plaintiff or defendant in the original cause, is thence called the plaintiff in error; and the opposite party is called the defendant in error.*
- Of suing out the writ.** *The first step to be taken in proceeding in error, is to bespeak the writ of error; prepare the precipe, No. 1, FORMS subjoined. Carry sawe to the cursor of the county where venue is laid, who, according to the exigency of the case, will either procure the writ to be sealed at a private or at the public seal, and he will direct you when to call for the writ; pay for the same £1. 10s. 6d. If privately sealed, pay 8s. 6d. more.*
- Allowance and service.** *Having procured the writ (No. 2, FORMS subjoined) first taking a copy as soon as may be, agreeable to R. G. E. 36 C. II. deliver it to the clerk of the errors, Mr. Smith, at the chambers of the L. C. J. K. B. Serjeant's-Inn. Pay, on allowance, which is of course, £2.*
- The allowance is No. 3, FORMS subjoined. A correct copy of the allowance may be served on the opposite party, either immediately or on the taxing the costs; and at the time of service, the original allowance should be shewn: this is in the ordinary course of proceeding. But if the defendant in error, with a view to defeat the writ of error, will not proceed to sign the judgment until after the return of the writ of error the court will not quash it; see the cases, sect. III. of this title.*
- As to bail.** *In four days exclusively after the service of the allowance of the writ of error, or within four days after judgment signed, provided such allowance shall have been served before, bail in error must be put in with the clerk of the errors, in court or before a judge; procure necessary attendance; give the notice, No. 5, FORMS subjoined; pay in court £1. 12s. 8d. if at chambers only £1. 5s. 6d. The names of the bail, with their additions, are previously given on a slip of paper to the clerk*

of the errors, by whom they are duly entered in a book kept for that purpose. See the recognizance, No. 4, FORMS subjoined.

Where bail is put in, in vacation, it should be recollected, that notice should be immediately given of their justification for the first day of the next term. This is done in the way usual in cases of bail on ordinary occasions. See the case presently cited.

The allowance of the writ of error being served, and bail, where necessary, duly put in, and notice given, the next step to be taken is on the part of the defendant in error, who is to procure a rule for better bail; this he must do in twenty days, or not at all, agreeably to R. G. M. 5 W. & M. See No. 6, FORMS subjoined; pay for the same 2s. serve copy. If this rule be served in the vacation, the bail in this court need not justify till the next term; but notice of justification for the first day of next term, should, I think, be given within four days after the service of the rule for better bail, No. 7, FORMS subjoined. And it appears that only the bail of whom such notice shall have been given, will be permitted then to justify. See the case below, unless under special circumstances. Same case. See also *Ostreich and Another v. Wilson*, 1 M. & S. 367, n. but a difference in this respect in C. P. will be mentioned in its place. The same rule as to how many days notice of justification are necessary to be observed in error, as in common cases, ante. A rule for the allowance of bail must also be duly obtained, and a copy served, No. 8, FORMS subjoined. The bail is justified in court, and the clerk of the errors has notice to attend. Pay court fees 9s. 6d. and clerk of the errors 10s.

But where the plaintiff in error, within four days after being ruled to put in better bail, viz. on the day after Hilary Term, gave notice that he should justify the same bail on the first day of the ensuing term, and two days before the first day of that term, gave notice of fresh bail, it was held, that the latter were not entitled to justify, there being no reason assigned for the non-attendance of the former bail. *Lunn v. Leonard*, 1 M. & S. 366. *Hickley v. Hutton*, B. R. H. 27 G. III. 1 M. & S. 368, n. contra.

It is a rule that no time be allowed to justify bail in error. Per Bayley, J., E. 55 G. III. K. B. Tidd, 298. But see an exception to this rule, *Dyott v. Dann*, 1 D. & R. 9.

The defendant in error, on being served with the allowance of the writ of error, and bail being perfected, or if bail are unnecessary, may, on the assign day of the term on which the writ of error is returnable, apply to the clerk of the errors, Mr. Smith, before mentioned, for a rule to transcribe or to certify the record; pay for the same 2s. See No. 9, FORMS subjoined. Serve copy on the attorney for the plaintiff in error; the eight days are reckoned exclusive.

Rule to certify or transcribe the record.

The defendant in error at the time of taking out this rule, or soon afterwards, leaves a close copy of the whole proceedings with the clerk of the errors; and the attorney for the plaintiff in error, within the time mentioned by the rule, pays the clerk of the errors £1. 1s. on account of transcript; and when afterwards called upon by him, care must be taken to pay the remainder, or a non pros may be signed.

If the judgment be on inquiry, a bill should be filed with the clerk of the declarations, entitled of the same term with the declaration.

The transcript being complete, a copy is delivered by the clerk of the errors to the attorney for the defendant in error, who thereupon proceeds to the treasury to examine the same with the roll there; pay for examining in vacation, 7s. 10d. This step concludes the proceedings by either of the parties for this first term; it being that of which the judgment in the original action is signed.

Conclusion of proceedings in error the first term.

Rule to allege diminution.

The following term being the second from the issuing of the writ of error, the proceeding is recommenced on the part of the defendant in error. His attorney then obtains of the clerk of the errors in the Exchequer Chamber, to whom the transcript has been delivered over, a rule to allege diminution, pay 2s. 4d. a copy of which he, in like manner, duly serves on the attorney for the plaintiff in error. See the rule, FORMS No. 10, subjoined. This, like the former, is an eight-day rule.

On being served with this rule, it is incumbent upon the practitioner to see that on application at the office of the clerk of the errors in the Exchequer Chamber, the whole sum due, which is 8d. per folio, be paid.*

Observation as to alleging diminution.

The alleging diminution, on the part of the plaintiff in error, is almost in every case, confined to the business of paying these fees.

See certiorari, ante.

Where any real ground for alleging diminution exists, such ground is formally alleged; such as the want of an original; or an imperfect record; upon which a writ of certiorari is issued, as to which see ante, where that title is treated at length. See also title DIMINUTION IN ERROR, ante.

Conclusion of the second term.

The payment of these fees may be said therefore, generally, to constitute the business of the second term, on the part of the plaintiff in error.

* An omission on the part of this officer to demand the whole sum due on alleging diminution, ultimately cost a very respectable practitioner, in the city, some years since, nearly £300.

I shall relate the circumstances shortly. On being served with the rule to allege diminution, an application, agreeably to the very plain direction in Mr. Impey's practice, K. B. of that date (about 1789,) was made by the then managing clerk in the attorney's office, and he paid to Mr. Cecil, the then clerk of the errors in the Exchequer Chamber the full sum demanded by him. In a few days afterwards Mr. Edge, at that time an agent in error, called at the office of the attorney, and mentioned that Mr. Cecil had sent to him, Mr. Edge, who, as was known to Mr. Cecil, had before acted as agent in error for the attorney, for money due on a rule for alleging diminution. The attorney's clerk replied, that the money had been paid; and referring to the disbursement book, specified the day. Mr. Edge returned satisfied, as was the clerk who had paid the sum "demanded," that the rule had been obeyed. In a day or two, a *non pros* for want of payment of the transcript money, was signed, and an execution for the debt and costs was levied. An application was immediately made to the court for a rule to shew cause why the execution should not be set aside, &c. &c. The direction in Mr. Impey's book of practice was stated to have

guided the managing clerk, who also deposed to having paid the sum demanded at the office of, and by Mr. Cecil, agreeably to the practice laid down by Mr. Impey. The court refusing to interfere, the plaintiff in error brought an action against the attorney, and finally recovered the sum levied under the execution, with costs. It should be observed that had the writ of error been prosecuted, the original judgment must have been reversed.

An opinion was taken on the general question, and the fact of the payment of the sum demanded by Mr. Cecil was stated; the opinion, of great legal authority at that time, strongly asserted the liability of that officer to the attorney, but the practitioner was averse from seeking indemnity at the hands of Mr. Cecil; especially as it appeared he had not captiously or hastily signed the *non pros*, but had previously sent to Mr. Edge supposing him to be still the agent in error of the practitioner.

It will be readily perceived that there can be nothing invidious in the mentioning these circumstances; the cause was attended with those ill-fortuned accidents which will occur, notwithstanding great care; but this should operate as a reason, more forcibly to impress upon the practitioner the necessity there is for due vigilance in his profession. At that time, indeed, agency in error had not become so general as it now is.

Any time in the third term, most usually early in the term, a rule. Proceedings the to assign errors is taken out by the attorney for the defendant in third term. error; pay 2s. 4d.; a copy is duly served. See No. 11, FORMS.

On receiving this rule, which expires in eight days after service, the Of assigning er- attorney for the plaintiff in error, in due time, either assigns for error rors. such matter as he may be advised is error; or what is much oftener the case, in a very large proportion of the prosecutions of the writs of error, he assigns general errors only: that is to say, it is left to the officer to assign such general errors only on the record; and the plaintiff's attorney sufficiently complies with the rule by paying the proper fees due on assigning such errors; these are 6s. See title ASSIGNMENT OF GENERAL ERRORS, No. 12, FORMS, subjoined.

But something more must be done by the practitioner where real errors When special er- are to be assigned. The papers are laid before counsel or special rors are assigned. pleader; who settles or draws such special assignment of errors; fee, according to their length and importance. A fair copy of these, signed by counsel, is given to the clerk of the errors in the Exchequer Chamber. Several forms of special assignments of error will be found subjoined. These may be easily adapted to the exigency of the case.

But where by the pleadings questions upon matter of law are already raised, the assignment of special errors, re-alleging such questions is altogether unnecessary. At least it so struck me when advising upon a very special case lately argued at great length upon the assignment of general errors only. No objection founded on the absence of special assignment of errors, was taken, and the court of error gave judgment. *Watkins v. Flanagan*, H. 4 G. IV. In Error, in the Ex. Ch.

The fees are to be paid. The defendant in error having joined in Joinder in error. error by pleading in nullo est erratum, the case is ready for argument in the Court of Exchequer Chamber. This plea is duly engrossed and delivered to the clerk of the errors, who enters the same. See As to argument where no real error. a general form of this plea, No. 13, FORMS subjoined. But argument may not take place till the term after errors assigned. The cause is set down by the officer above mentioned in course: pay him 9s. 8d.

The judgment, where there is no real error, being affirmed, the As to judgment where no real error. plaintiff in error either sues out a writ of error in parliament, or execution issues against himself, his goods, or his bail; or, from the convenient delay which the prosecution of the writ in error has afforded him, he may have become enabled to pay the debt and costs.*

If the errors demand argument, obtain a copy of the proceedings of Where the errors are to be argued. the clerk of the errors; pay him 8d. per folio. Deliver copy to the plaintiff's attorney. The argument takes place on a day early in the term, called the affirmance day. See title AFFIRMANCE DAY, ante; and if not then decided, the argument is resumed on the adjournment

* I have cancelled the note which in the former edition of this work was appended to this sentence; convinced, from the gross abuses to which the practice has led, that the writ of error is, in 499 cases out of 500, a flagrant abuse of the forms of justice. See note, page 603, ante. If delay be often of just importance to a debtor, and which sometimes it is even to his creditors, as a body, let the legislature, or rather the court, devise

some mean for obtaining it less ruinously absurd than those which the groundless writ of error presents. Perhaps time might be granted under special circumstances, and bail for the money exacted in all cases on the expiration of such time.

But any modification of this description might not touch the practice where real error might appear to the satisfaction of the court, or where the question of error might admit of argument.

day, which is appointed a few days before the end of the term. See title **ADJOURNMENT DAY**, ante.

What to be delivered to the judges and barons.

On the day appointed for argument, the record will of course be in court. The judges of the court are to be supplied with a correct copy of the record and proceedings four days previously to argument; and the following rule requires attention. **IT IS ORDERED**, that no copy of error and record thereupon to be delivered to the said justices and barons, before the attorney for the plaintiff upon the writ of error, shall give ten days notice to the clerk of the errors in the Exchequer Chamber, that the error assigned in the record is to be argued before the said justices and barons for both parties; and that the attorney for the plaintiff shall deliver four copies to the justices of the Common Pleas; and the attorney for the defendant shall deliver four other copies to the barons of the Exchequer for four days before the hearing the same. **R. G. E. 33 C. 11.** And if the party appearing on argument shall have neglected to deliver paper books in error, it seems he will be liable to be punished with payment of costs. *Johnson v. Prescott.* In Error, in the Exchequer Chamber, 4 Taunt. 147.

Mark the points.

It may seem also that the practice on argument on demurrer may also be adopted in that on error; namely, that in case of error, the points intended to be made should be marked in the margin of the copy of the proceedings supplied to each judge.

Employ counsel.

Counsel will also be furnished with a complete copy of the record and proceedings, and otherwise sufficiently instructed: the number of whom to be retained, and the fees to be given with the copy of the pleadings, will be proportioned to the magnitude and legal difficulty of the question.

Of execution on affirmance.

In four days after the judgment of the court below shall be affirmed, the costs in error may be taxed, and execution may issue from the court of K. B. Interest will of course have been claimed on argument or on affirmance; this and the costs are added to the former judgment. Pay 5s. for the certificate of affirmance on the roll, and 2s. 6d. for filing at the treasury.

Move for interest.

At the time of affirmance, indeed, counsel moves, in pursuance of notice for that purpose given in the Exchequer Chamber, No. 15, **FORMS**. This motion is made upon an affidavit as to the description of action. No. 16, **FORMS**, for a rule to shew cause why it should not be referred to the clerk of the errors to calculate and ascertain the amount of the interest upon the final judgment, after the rate of 5l. per cent., from the time of final judgment being entered up until the affirmance of final judgment in this court, and that such interest may be added to the damages for which such final judgment was entered up. The clerk of the errors, on affidavit of service of the notice, draws up this rule. Serve copy on the attorney for the plaintiff in error. Be ready on the day appointed by the rule, with an affidavit of service indorsed, to move to make the annexed rule absolute.

By this proceeding for interest, it seems that final judgment in error cannot be obtained till after the adjournment day in term.

As the allowance of interest appears to be discretionary, a party in error cannot now anticipate that more than 4l. per cent. will be allowed.

The plaintiff in error in the Exchequer Chamber is not confined to the taking out one rule in each term, but may proceed as quickly as he pleases. *Home v. Bentinck*, 1 B. & A. 514.

See title **SECURITY FOR COSTS**, post.

That the practitioner may at one view see the order of proceeding in error in the Exchequer Chamber, I have subjoined an authentic form of the whole entry on roll, with the remittitur. See No. 14, **FORMS** subjoined.

XIII. PRACTICAL DIRECTIONS.

IN ERROR FROM K. B. AND EXCHEQUER CHAMBER, TO
THE HOUSE OF LORDS IN PARLIAMENT.

This writ of error is brought where the proceedings in the cause have been prosecuted in K. B. by original writ issuing out of Chancery. No court where this is the case, other than the House of Lords in Parliament, which is the supreme court of appeal of England in error, having competent jurisdiction.

In what cases brought.

It is also brought on judgment given in the Exchequer Chamber, on judgment in K. B.

It is also brought upon a judgment in error in K. B. upon a judgment obtained in C. P.

It is also, with some few exceptions, brought, upon a judgment in error, in K. B. upon a judgment obtained in an inferior court. 2 Tidd, 1162.

To procure a writ of error in parliament a precipe is delivered to the cussitor as before. No. 17, FORMS subjoined. The return will be governed by the period of the present or ensuing session; pay for the same £6. 15s. 6d.; if private seal, £3. 1s. more. No. 19, FORMS subjoined. In this charge, that for the requisite warrant to be procured from the king, is included.

To obtain the writ.

Take copy of writ to keep, and when made deliver the writ to Mr. Smith, the clerk of the errors, K. B. Pay for the allowance £4.

Allowance.

No. 21, FORMS subjoined. Serve copy thereof on the attorney for the defendant in error. If bail be necessary, observe the directions ante.

On bail, where necessary, being completed, as soon as parliament sits the defendant's attorney in error obtains of the clerk of the errors K. B. a rule to transcribe, a copy of which is served as before mentioned. No. 22, FORMS subjoined. The defendant's attorney delivers to the clerk of the errors a copy of the proceedings, who sends for the transcript money, also mentioned ante.

Where bail necessary. Rule to transcribe.

It may be expedient to remark here that the plaintiff in error may non pros his own writ of error, without carrying over the transcript to the court of error. Milborn v. Copeland, 1 M. & S. 104; and that, without costs in error, agreeably to the practice in the Exchequer Chamber.

The clerk of the errors then delivers the transcript, when complete, to the lord chief justice K. B., who thereupon carries up the record and transcript thereof to the House of Lords, where they are examined. The transcript is retained, and the lord chief justice takes back the record. The fee to the lord chief justice is £4, and this is to be paid by the plaintiff in error, at the time of paying the transcript money.

Transcript carried up.

From this period clerks or agents in parliament are employed by the attorneys on each side, to take the necessary subsequent steps; and between these gentlemen the necessary notices and papers pass as between practitioners in common cases.

Who now conduct the cause.

These notices are, 1st, For the plaintiff in error, by a day certain, usually, eight days intervening, to assign errors. General errors, Nos. 23 and 24, FORMS subjoined. If the plaintiff in error then allege diminution, he prays a writ of certiorari. This is issued without motion, and it is returnable in ten days; if not returned in that time, nor cause shewn to the contrary, the writ is lost. 2d. For the defendant in error, in like manner, by a day certain, to appear, or make his defence thereto. Or, 3d. for the hearing of the errors on a day certain. These several days are appointed on the motion of a peer,

The further several steps taken on error in the House of Lords.

and the day appointed for the hearing cannot be altered except on sufficient ground to be alleged on petition.

The proceedings, signed by counsel, are printed previously to the day appointed; usually 500 copies on each side. The proper distribution of these lies with the clerks in parliament.

The parties, on the day appointed, attend by counsel; two only are heard on each side.

The judgment being affirmed or reversed, a remittitur of the record to the court of K. B. is drawn by the clerk of the parliament, and such reversal or affirmance is duly entered of record in that court.

As a general guide to the practitioner, the standing orders of the House of Lords, in cases of writs of error, are subjoined.

Fees to be paid.

Errors to be assigned in eight days, or non pro.

IT IS THEREFORE ORDERED, by the lords spiritual and temporal in parliament assembled, That the plaintiffs in all such writs, after the same and the records be brought in, shall speedily repair to the clerk of the parliaments, and prosecute the writs of error, and satisfy the officers of this house their fees justly due unto them, by reason of the prosecution of the said writs of error, and the proceedings thereupon, and further shall assign their errors within eight days after the bringing in of such writs with the records, and if the plaintiffs make default so to do, then the said clerk, if the defendant in such writs require it, shall record that the plaintiff hath not prosecuted his writ of error; and that the house doth therefore award that such plaintiff shall lose his writ, and that the defendant shall go without day, and that the record be remitted; and if any plaintiff in any writ of error shall allege diminution, and pray a certiorari, the clerk shall enter an award thereof accordingly; and the plaintiff may, before in nullo est erratum pleaded, sue forth the writ of certiorari in ordinary course, without special petition or motion to this house for the same, and if he shall not prosecute such writ, and procure it to be returned within ten days next after his plea or diminution put into this house, then, unless he shall shew some good cause to this house for the enlarging of the time for the return of such writ, he shall lose the benefit of the same; and the defendant in the writ of error may proceed as if no such writ of certiorari were awarded. Dio Veneris, 13 Decembris, 1681.

Cases to be signed by what counsel.

ORDERED, That no person whatsoever do presume to deliver any printed case or cases to any lord of this house, unless such case or cases shall be signed by one or more of the counsel who attended at the hearing of the cause in the courts below, or shall be of counsel at the hearing in this house. Die Martis, 19 Aprilis, 1696.

Cases not to be put off without two days notice.

ORDERED, That when a day shall be appointed for the hearing any cause, appeal, or writ of error, argued in this house, the same shall not be altered but upon petition; and that no petition shall in such case be received, unless two days notice thereof be given to the adverse party, of which notice on oath shall be made at the bar of this house. Dio Mercurii, 22 Decembris, 1703.

Certificates to be given of certiorari's being awarded.

ORDERED, That in all cases upon writs of error depending in this house, when diminution shall be at any time alleged, and a certiorari prayed and awarded before in nullo est erratum pleaded, the clerk of the parliaments shall, upon request to him made, give a certificate that diminution is so alleged, and a certiorari prayed and awarded thereupon. Dio Veneris, 21 Februarii, 1717.

Printed cases to be given to the lords before hearing.

ORDERED, That in all writs of error appointed to be heard in this house, the appellants and respondents, the plaintiffs and defendants, or their respective agents or solicitors, do for the future deliver to the clerk of the parliaments, or clerk assistant, to be distributed to the lords of this house, the printed cases upon such appeals or writs of error, at least

four days before the hearing of the same; and that no other different cases, in any such causes, be at any time afterwards printed or delivered. Die Martis, 12 Januarii, 1724.

ORDERED, That at the hearing of causes for the future, one of the counsel for the appellants shall open the cause, then the evidence on their side shall be read; which done, the other counsel for the appellants may make observations on the evidence: then one of the counsel for the respondents shall be heard, and the evidence on their side to be read; after which, the other counsel for the respondents shall be heard, and one counsel only for the appellants to reply. Die Sabbati, 2 Martii, 1727.

How counsel are to proceed at hearing causes.

ORDERED, That when any writ of error shall be brought into this house during the sitting of parliament, the plaintiff and defendant shall severally lay the prints of their cases upon the table of this house, or deliver the same to the clerk of the parliaments for that purpose; within a fortnight after the time limited by this house for the plaintiff to assign errors, unless an earlier day be specially appointed for that purpose in respect of such writ of error being brought merely for delay. Die Veneris, 12 Julii, 1811.

Printed cases to be laid on the table, or delivered to clerk of the parliaments, when.

ORDERED, That for the future the printed cases delivered in appeals and writs of error depending before this house, shall contain a copy of so much of the proofs taken in the courts below, as the party or parties intend to rely on respectively on the hearing of the cause before this house, together with references to the documents where the same may be found. Die Mercurii, 24 Februarii, 1813.

Printed cases to contain, what.

XIV. PRACTICAL DIRECTIONS:

IN ERROR FROM C. P. TO K. B.

The practice as to the issuing the writ of error, where error brought in K. B. on a judgment in this court, will be nearly the same as on prosecuting error from K. B. to Ex. Ch.

The general directions are the same as in other cases.

The precipe for the cursitor in this case, is agreeable to No. 25, FORMS subjoined.

The writ of error itself is agreeable to No. 26, FORMS subjoined. Pay for the same 17s; 8s. 6d. more, if private seal. Mr. Sherwood, of the Common Pleas Office, Tanfield Court, Inner Temple, transacts the business of clerk of the errors in this court. To him, therefore, the writ of error is to be delivered; the fee for allowance is £2. 12s. 6d. The allowance is the same as in error from K. B. to Ex. Ch. No. 27, FORMS subjoined, and it is in like manner served. Bail, if necessary, is to be put in in four days, as before mentioned; fees on putting in bail, £1. 4s. Give notice, No. 28, FORMS subjoined. But the difference in the practice of the two courts, to which allusion has before been made, is to be noted: this difference is, that in error from K. B. to Ex. Ch. notice of justification is given, within four days after service of the rule for better bail for the first day of the next term, as previously mentioned, see page 633, ante; whereas, in error from K. B. to Parliament, C. P. to K. B. if the allowance be served, or judgment signed in vacation, and bail be thereon put in, and if a rule for better bail, No. 29, FORMS subjoined, be served also in vacation, the bail must justify in four days at a judge's chambers; and due notice, as in other cases of bail in C. P. previously to such justification, must be given, No. 30, FORMS subjoined. Be prepared, therefore, with affidavit of service of notice, and attend with the bail, agreeably to notice. The clerk of the errors attends with the book, to whom the names of the bail are delivered; pay £1. 4s. Obtain rule for allowance of secondary, pay 7s.; serve copy. If it be term time when the bail are put in, proceed as before directed, mutatis mutandis.

The issuing the writ.

Of putting in bail in error in this court.

Rule for allowance.

Exception to
bail.
Rule for better
bail.
When to justify.

The defendant in error excepts against the bail in the book of the clerk of the errors, and then obtains the rule for better bail, above-mentioned, No. 29, FORMS subjoined; pay for same 6s.; serve copy. The bail already put in must justify, or bail that will justify must be added, and justification must take place within four days from the service of the rule for better bail, and notice may be given of fresh bail, though after the execution of the rule. *Hickley v. Hutton*, H. 27 G. III. 2 Tidd, 1021, n. If in vacation, the bail must justify before a judge at chambers, as above stated. If in term, the justification is similar to other justifications in open court; but the clerk of the errors should have notice to attend; fees 14s.; pay clerk of the errors 6s. 8d. See notice of justification, No. 30, FORMS subjoined. It may be observed, that the bail in error may be the same as those in the original action; and it should also be recollected, that bail in error are bail for the money in case of judgment in error. See note on the recognizance in error, with the difference pointed out between that on the present occasion and that on error from K. B. to the Exchequer Chamber, No. 31, FORMS subjoined. The attorney for the defendant in error will have made due inquiry as to the sufficiency of the bail, and he opposes them or not as he sees occasion, and as in common cases.

Observation as to
bail in error.

Bespeak original.

The bail being complete, the next step is to be taken by and on the part of the defendant in error, who proceeds to issue an original, lest the want of it should be assigned for error. For this purpose leave a precipe for the original, agreeably to No. 32, FORMS subjoined, with the cursitor of the proper county; pay for original 14s. 6d.; fine as in other cases, according to the amount. Procure this original to be returned and filed, as is usual in other cases; pay 4d. filing, and 4d. for every post terminum. For more particular proceedings, and for the Forms as to suing the original, see title CERTIFY THE RECORD; Rule to certify the Record. The foregoing proceedings will supply the want of an original, and it is not probable that the party will avail himself of the condition upon which his honour the master of the rolls has granted it, which is upon payment of costs to the plaintiff in error, in case he, such plaintiff, shall not further prosecute the writ of error. Serve the copy of the petition and order on the plaintiff's attorney in error, and tender the costs agreeably to the order as directed ante. These proceedings conclude the first term in proceedings in error, C. P. to K. B.

Conclusion of the
first term in er-
ror.
Rule to tran-
scribe.

The following term being the second, the defendant in error applies to the clerk of the errors, for a rule to transcribe or to certify the record; pay for same 6s. This is an eight-day rule, and expires in eight days after service. See No. 33, FORMS subjoined. The copy of this rule may be served on the plaintiff in error. *Green v. Upton*, Bar. 410. But it is most usual to serve the same on his attorney.

The next step is taken on the part of the plaintiff in error, who, in due time after being served with the rule to transcribe, applies at the office of the clerk of the errors, and leaves £1. 1s. on account of transcript; it may be safer to do this than to wait a message from the clerk of the errors, as mentioned ante. See title CERTIFY THE RECORD; Rule to certify the Record.

The attorney for the defendant in error, at the time of obtaining or pending the rule, leaves a copy of the proceedings in the original action with the clerk of the errors, who is thereby enabled to complete the transcript; for doing which, the fees called transcript money, are received by him. After the payment of the guinea on account, and when the transcript is finished, the clerk of the errors sends for the remainder of the transcript money to the plaintiff's attorney in error. And see page 634, and note, ante.

The roll will of course have previously been carried in and doggeted. Carry in roll. See title DOGGETTING; Doggeting Judgment, &c. ante. But as in this case there may be some intricacy of proceeding, the practical direction as to doggeting the roll, will in this instance be repeated.

The warrants of attorney, written on parchment, are to be filed. How to dogget in error. *The proceedings in the original action, as far as the plea, or interlocutory judgment signed in the action, are to be entered on the roll; no memorandum is necessary. When this is done, clerk of the judgments at C. P. office adds the final judgment, from the postea or inquisition, of both of which he will, on the signing of final judgment, have obtained the custody. Call in a day or two for the roll. The fees were paid to the prothonotary on signing the judgment.*

With this roll, the clerk of the errors examines the transcript, with the defendant's attorney in error. Pay 2s. 9d. and the judgment is then to be doggeted, if not already done. The roll is finally left with the prothonotaries, or with the clerk of the essoigns, to take to the Treasury in Westminster Hall; nothing paid on leaving the roll, if left within two terms after judgment; if more than two terms have passed since the judgment, pay 3s. 4d. The remainder of the transcript-money should now be paid, or the writ of error will be non prosed.

The rule to certify the record, or to transcribe, usually but not necessarily engages the second term of the proceedings in error, and the vacation following; but it has been usual in this court to make the transcript as soon as possible; for the clerk of the errors will, if there be time, complete the transcript in the same vacation, or if the rule be given in term, if there be time sufficient, the transcript will be taken in the last day of that term. The right of the clerk of the errors to complete the transcript earlier than the eight days allowed by the rule, is clear. For if the defendant in error from C. B. into B. R. give such rule, the record may be certified in less time, though the rule expire in vacation. Sambidge v. Housley, 2 T. R. 17.

Though non pros be signed for want of certifying in time, agreeably to the rule, the defendant in error cannot have costs. Salt v. Richards, in error, 7 East, 111. And by rules T. and M. 28 C. II. C. P. execution cannot be taken out without a certificate from the clerk of the errors that the plaintiff in error has made default in transcribing the record into K. B. If non pros now signed, as to costs.

The certifying the record, terminates the suit in the court of Common Pleas, or court below. The record, or agreeably to the practice, the transcript thereof, is delivered over by the clerk of the errors to the signer of the writs, of whom a copy thereof may be obtained by both parties; but it will be necessarily obtained on the part of the defendant in error, for reasons which will presently appear. Pay 4d. per folio, on unstamped paper. Conclusion of proceeding in court below.

The chief justice of the Common Pleas usually signs the return to the writ of error; but this is unnecessary, and the record is never sent, though so required to be by the writ, sub pede sigillo. See Blackwood v. The South Sea Company, 2 Str. 1063, 4.

The writ of error may require amendment; or it may abate; or it may discontinue; or the defendant may move to quash it. See ante. But if the suit in error proceed, the next step, in order to accelerate the termination of the proceedings, is the issuing the scire facias quare executionem non. See this writ, subjoined. If the transcript shall have been completed on the last day of the term, this writ may be tested that day, and made returnable the first day of the following term. If the transcript be not delivered over till the first day of the term, the scire facias cannot be issued till after that day, and must bear teste the first

day of the term. A scire facias quare executionem non having been issued immediately upon the record being certified returnable the first day of the following term, the defendant's attorney may serve the plaintiff's attorney in error on that day with a rule to appear to the scire facias, and a rule to assign errors. *Sambidge v. Housley*, 2 T. R. 17. There must be fifteen days between the teste and return of the scire facias, whether by bill or by original; and by original the return must be general, and not, as by bill, on a day certain. *Eden v. Wills*, 2 Lord Raym. 1417.

For the precipe, see No. 34, FORMS subjoined.

This writ is to be engrossed on parchment, No. 35, FORMS subjoined, signing, 1s. 8d. sealing, 7d. Carry same to the sheriff's office, who grants a warrant thereon; the plaintiff in error is warned, and the Sheriff returns scire feci. Pay for warrant 2s. 6d. summons, 6s.

Of the second sci. fa. to be returned nihil. By reason of the delay thereby occasioned, a second scire facias is seldom issued in this case; but if that be done, no proceeding is had on the first, but both are returned nihil, and as lately ruled in *Sharp v. Clarke*, 13 East, 391, on the quarto die post of the return of the last, and not before; or if only one scire facias be obtained, give a rule thereon at the clerk of the rules, agreeably to No. 37, FORMS subjoined. Pay 2s. 10d. This rule expires in four days.

An award of a second scire facias on the roll will be found amongst the FORMS subjoined, No. 40.

Assignment of errors.

The plaintiff in error, before the expiration of the rule for judgment on the scire facias, must proceed to assign errors, or to allege diminution, or he must allow judgment to go against him on the scire facias; for he cannot now plead thereto. 2 Crompt. 348. If he allege diminution, he first prays a certiorari, and then alleges the diminution; but as this is wholly a dilatory step, the defendant in error urges his proceeding thereon, by compelling a return to the certiorari; and he therefore obtains from the master a rule for that purpose on the back of the draught of the scire facias quare executionem non. This rule must be entered with the clerk of the rules, and expires in four days exclusively, Sunday and any other dies non excepted. It seems that the rule may be given on paper unstamped at the clerk of the rules, without any application to the master. He thereupon proceeds to make the same out, as mentioned under title CERTIORARI IN ERROR, ante.

Where errors not assigned, judgment.

It may appear that the rule on the scire facias quare executionem non in error from C. P. to K. B., so far analogous with the rule to assign errors, where error is brought from K. B. to Ex. Ch., as that if on the expiration of the rule on the sci. fa. the plaintiff in error do not assign errors, or allege diminution, as above mentioned, execution may be issued without non pros and costs; but the writ of error may be in due course non prossed, and then the defendant in error gets costs. To obtain these, therefore, he may, notwithstanding the execution, obtain a rule from the master to assign errors on record. See No. 38, FORMS subjoined. Which, if not done, the non pros may be signed and costs will be allowed; and this is the usual course previously to issuing execution on the sci. fa. as in this case the costs may be added to the original debt and costs. See stat. 3 H. VIII.

Of non pros, in order to obtain costs.

And it has been determined that after the return day of the scire facias quare executionem non, &c. sued out by the defendant in error, and a rule to appear, and a four-day rule to assign errors served on the plaintiff in error; though judgment of non pros were entered up, and execution sued out before the expiration of the rule to assign errors, yet if error were not assigned in time, the execution stands good. *Wright v. Peckham*, 15 East, 204.

The judgment may be reversed, although execution hath issued, and restitution may be had: but if the plaintiff in error, within the time specified in this rule, which is also a four-day rule, do not assign error, the judgment may be signed at the King's Bench office. For this purpose enter the sci. fa. on the same roll with the transcript. Add the costs, and issue execution. See Law and Practice of Error.

If only one sci. fa., with scire feci returned, the rolls and entry must be entitled of the same term with the sci. fa.; if two issue, then of the term of the first sci. fa. with an award of the second. See No. 30, FORMS subjoined.

Of entry on record where only one sci. fa.; where two.
Of assignment of errors.
Diminution.

But after transcript, the plaintiff in error generally proceeds to assign errors, and these may be the want of original, which is called alleging diminution, as above mentioned. See a form for this purpose, No. 41, FORMS subjoined. Engross the same on paper, and get counsel's hand. Deliver engrossment to defendant's attorney.

If the certiorari, with the return, be not filed, the defendant in error may join in error, pleading in nullo est erratum; and entering a non misit breve on record, he is entitled to proceed; and the error assigned by reason of alleging diminution not appearing by a certiorari, and a return thereto, is void, and no further notice is taken of the diminution so alleged.

Joinder in error.

It is however observed, that if a wrong original be certified, or that there is no original, the defendant may suggest before in nullo est erratum pleaded, that there is an original of another term. In case, a certiorari may issue to the custos brevium, to certify the same, and another may be issued to the chief justice of C. P. to certify the continuance. Law and Practice of Error, 51. And in the same place, it is further observed, that if a wrong original be certified of the same term, the placitum of the defendant may suggest that there is a right original even of the same term; and when both are before the court, the record will be thereby applied to that which is right. If, through the omission of the defendant's attorney in error, there be really no original, a petition to the master of the rolls must be presented; and one obtained, as mentioned above.

Where a wrong or no original is certified.

But these points, together with a very great number that are found in the books, rarely, if ever, occur in practice: but, while the practice is at least recognized in modern books, this compilation might be deemed wanting were they not to be here found.

Observations as to these points.

A joinder in error, after return of certiorari, will be found, No. 44, FORMS subjoined. This, engrossed on paper, is to be delivered to the plaintiff's attorney in error.

Joinder in error.

If however there be assigned for error other matter than the want of original, such error is assigned in the same way. But no certiorari issues, save in cases of supposed imperfect record; as for the want of warrants of attorney. A form of such assignment of error will be found, No. 42, FORMS subjoined; and also a joinder in error that there is a warrant of attorney, No. 44, FORMS subjoined.

But general errors are usually and in a very great proportion of cases assigned for error, such assignment requiring counsel's hand, but not the joinder in error; the forms of both will be found, Nos. 45 and 46, FORMS subjoined.

After the return and filing of the certiorari, or if diminution shall not have been alleged, but general errors only assigned and joinder in error duly delivered, either party may immediately obtain a consilium; counsel ls. 6d. The clerk of the rules draws up the rule. Rule 6s. 6d.; serve copy. The form is No. 48, FORMS subjoined.

As to moving for consilium.

The defendant's attorney in error in the mean time enters the whole proceedings on the roll of the same term with the transcript. It is not probable that the plaintiff's attorney in error will take this step or any other tending to accelerate the termination of the suit; and therefore it may be in place to mention the proceeding to be adopted by the defendant's attorney. In order to exhibit a complete view of what appears on the roll in error, the form, No. 50, FORMS subjoined, has been selected.

What the roll contains before argument.

The King's Bench roll must contain the whole proceedings, in both courts, from the beginning to the end. It commences, As yet, &c. Witness Sir Charles Abbott, knight, &c. as in the precedent. The writ of error is then begun upon a new line; then follows the return, &c.; then the declaration and final judgment in the Common Pleas: all this appears in the paper book to be obtained of the clerk of the signer of the writs, as mentioned ante; next commence a new line with the assignment of errors. Conclude with the joinder in error.

This roll is to be taken to the judgment office and there docketed; pay —. The clerk of the papers marks the roll read.

Deliver copies of proceedings to judges, &c.

If it be intended to argue the errors, such argument may now take place; see page 635, ante; but four days previously at least thereto, paper books or copies of the roll are to be delivered to the judges; two are made by the plaintiff's attorney, to be delivered to the lord chief justice and the senior puisne judge; and two by the defendants, to be delivered to the two other judges. Pay the respective clerks 2s.

Mark the points.

The points should be marked as mentioned, page 636, ante.

If the plaintiff's attorney in error do not deliver the books in the time specified above, the defendant's attorney in error may; and the judgment is of course affirmed without argument.

But if the other party also deliver the books or copies of the roll to the judges, further preparation must be made for argument. In that case copies are to be delivered to counsel, with fees proportioned to the importance of the question, and they are otherwise instructed as there may be occasion. In matters of very great interest or importance, one or more consultations will be had. The cause is to be set down for argument with the clerk of the papers; pay 1s. Attend court. The court fees are 1s. 6d. The rule for judgment is drawn up at the clerk of the rules; pay 6s. 6d. The master signs the judgment on the roll which must be produced to him for that purpose, by the clerk of the Treasury.

The costs are marked on the rule. No bill appears to be necessary.

Further respecting the judgment in error, see sect. VIII. ante.

If the judgment is affirmed, such affirmance must be entered on the roll, agreeable to No. 49, FORMS subjoined. Pay clerk of the Treasury entering same, 3s. 4d.

As to what is to be done, if the judgment be to reverse the judgment below, see sect. XI. ante.

XV. PRACTICAL DIRECTIONS.

IN ERROR CORAM NOBIS OR VOBIS.

After what has already been said upon the subject of error generally, and upon the writ of error coram nobis or vobis, properly coram nobis, when the error is in the same court, and vobis if it be in another, (see ante,) there remains little to be added here.

The writ cannot be brought in the Exchequer Chamber for judgments in K. B.; but error coram nobis thereon must be brought in K. B. and for judgments in C. P. this writ lies also in K. B. and then it seems properly called a writ of error coram vobis.

To obtain this writ, deliver precipe, No. 52, FORMS subjoined, to which the fiat of the attorney-general is first obtained; pay for fiat 8s. 8d. to the proper cursitor; who, on an affidavit of the error in fact being produced makes out the writ; but the affidavit is only required in case of infancy or coverture. See 8 East, 415; but the writ, see No. 53, FORMS subjoined, instead of being allowed by the clerk of the errors, must be taken to the master, K. B. in open court; if in term time, pay the master 2s. 6d. A rule is drawn up at the clerk of the rules, K. B.; see No. 55, FORMS subjoined, and which bears date, or is entitled before the allowance. A copy of this rule being served on the opposite attorney is a supersedeas of further proceeding in the original action; but if necessary, bail is to be put in justified, as in other cases in error.

By whom allowed.

Rule for allowance.

Mr. Impey, in treating error coram nobis, observes, that "there needs no supersedeas to this writ, as the rule stays the execution, although it be laid down in all the books to the contrary;" and, "that this writ cannot be allowed in vacation. ibid. 815, but the practice as to the writ being allowed in vacation is otherwise.

Whether supersedeas necessary. Rule to assign errors.

On the return of the writ, the attorney for the defendant in error applies to the master for a rule to assign errors; and only facts are assigned.

This proceeding, however, of writ of error coram vobis, is not very likely to occur often; but if it do occur, and the issue be taken upon the error in fact, the party may proceed to trial as in common cases; and if found for the plaintiff in error on trial, the court must be moved that the cause be set down for argument, and then producing the postea, the court will give judgment of reversal.

Error coram vobis not very frequent.

No scire facias to assign error is necessary, but a rule is obtained from the master as above stated; or, a motion must be made for a rule against the plaintiff in error to assign his errors. Law of Error, 78.

Abstract of heads of the roll.

To insert a precedent for the whole record in a case occurring upon either of these writs, might at first sight seem unnecessary, but a brief abstract of the proceedings, as entered on the roll, may shew in what order the whole case is brought before the court.

May be sued ex debito justitiæ.

The placitum roll; chief clerk; memorandum; writ; chief justice's (of C. P.) return; the declaration; plea; similiter; award of venire; jurata; postea; final judgment; assignment of error of fact; scire facias ad audiendum errores; sheriff's return of scire feci; plaintiff in error replies to the fact assigned for error, and traverses its being untrue; defendant in error's verification concludes to the country; similiter; award of venire; placitum; the jury is respited; postea; judgment on the issue for the plaintiff in error. See the whole proceedings at length. Law of Error, 78-84.

The frequent application of the principles upon which amendment and new trials have been granted, has, very beneficially to the suitor, rendered this mode of proceeding almost obsolete, though it is presumed either party may, ex debito justitiæ, yet sue the writ of error coram nobis, or that coram vobis.

XVI. FORMS IN ERROR.*

The Forms are arranged according to the order in which they may be required, and some precedents are added, to which no reference is made in the Practical Directions; these inserted are chiefly such as may be required; and many of them particularly shew the mode of entering continuances in error.

No. 1. (Vener.) Writ of error for ———, (the party bringing error) at
Precipe for writ the suit of ———, on a judgment in case (or whatever is the nature
 of error K. B. to of the action) in the King's Bench. By bill, of ——— term, 182—
 Ex. Ch. (Date.) ———, attorney.

No. 2. George, (&c.) To our right trusty and well beloved Sir Charles
 The writ of error. Abbott, Knight, our chief justice, appointed to hold pleas in our
 Writ recites court before us, greeting: Whereas, by a statute made in the parlia-
 stat. 27 Eliz. c. 1. ment holden at Westminster, the twenty-third day of November, in
 the twenty-seventh year of the reign of the lady Elizabeth, late
 queen of England, it was by the same parliament, among other
 things, enacted, that where any judgment should at any time there-
 after be given in the court of King's Bench, in any suit or action of
 debt, detinue, covenant, account, action upon the case, *ejectione*
firmæ, or trespass first commenced, or to be first commenced there,
 other than such only where we should be party, the party, plaintiff,
 or the defendant against whom any such judgment should be given,
 might, at his election, sue forth out of the Court of Chancery, a spe-
 cial writ of error, to be devised in the said Court of Chancery di-
 rected to the chief justice of the said court of the King's Bench for
 the time being, commanding him to cause the said record, and all
 things concerning the said judgment to be brought before the justices
 of the Common Bench and the barons of the Exchequer, into the
 Exchequer Chamber, there to be examined by the said justices of
 the said Common Bench and barons aforesaid, which said justices of
 the Common Bench, and such barons of the Exchequer as are of the
 coif, or six of them at the least, by virtue of the said act, should
 thereupon have full power and authority to examine all such errors
 as should be assigned or found in or upon any such judgment, and
 thereupon to reverse or affirm the said judgment as the law should
 require, other than for errors to be assigned or found for or con-
 cerning the jurisdiction of the said court of King's Bench, or for
 any want of form in any writ, return, plaint, bill, declaration, or
 other pleading, process, verdict, or proceeding whatsoever, and that
 after that the said judgment should be affirmed or reversed, the said

* If the substance of the proceeding be stated by way of recital, or otherwise, as occasion may require, it will be sufficient; the parties are not held to the letter of any precedent. Different compilers have given precedents of writs of error, rules, &c. in the same cases, and even the office precedents at different periods vary.

As the officers proper to the court, curators, &c. make out and issue most of the rules and other forms used in the course of proceeding in error, the

addition of such forms in a work purporting to be compiled for the use of the attorneys, may seem almost wholly unnecessary; but it will be obvious, that without a recurrence to these forms the practitioner would possess an acquaintance with the nature of proceeding in error less perfect than that which he most unquestionably will acquire from perusing them. The whole record will mostly suggest the grounds and reasons for the form, as well as exhibit the form itself.

record and all things concerning the same, should be removed and brought back into the said court of King's Bench, that such further proceedings might be thereupon as well for execution as otherwise, as should appertain, as in the said statute is more fully explained. And forasmuch as in the record and proceedings, as also in the giving of judgment in a plaint which was in our court before us by bill between _____ and _____, of a plea of *(the description of action)* as it is said manifest error hath intervened to the great damage of the said _____, as by his complaint we are informed; which said error no ways concerneth us or the jurisdiction of our said court of King's Bench, or any want of form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict, or proceeding whatsoever, as we are also informed. We therefore, being willing that the error, if any there be, should be duly corrected according to the form of the statute aforesaid, and that full and speedy justice should be done to the said parties in this behalf, do command you, that if judgment be thereupon given, then you cause the record and proceedings aforesaid, with all things concerning the same, to be brought before the said justices of the Common Bench, and barons of our said Exchequer into our Exchequer Chamber, on the _____ day of _____ next ensuing, that the said justices and barons, the record, and all things concerning the said judgment being examined, may cause further to be done therein, what of right, and according to the form of the said statute aforesaid, ought to be done. Witness ourself at Westminster, the _____ day of _____, in the _____ year of our reign *.

And general error in the record.

Debt (or case, as the action is.)

[Title cause.]

No. 3.

I have allowed a writ of error in this _____ cause, this _____ day The allowance. of _____, 182—.

_____, clerk of the errors.

No. 4.

You severally acknowledge to owe *(the plaintiff in the action)*, the sum of £—, *(double the sum recovered)* upon condition that _____ *(the defendant)* prosecutes his writ of error with effect; and if judgment be affirmed, shall satisfy and pay the debt, damages, and costs recovered, together with such costs of suit as shall be awarded by occasion of the delay of execution, or else you will do it for him.

The recognizance of bail in error in Exchequer Chamber.

In Error.

[Title cause.]

No. 5.

Take notice, that special bail was this day put in upon the writ of error brought in this cause, with the clerk of the errors, before _____ *(the judge, and where)*, and the names of the bail are _____, of _____, and _____, of _____, *(sufficiently describe the bail.)*

The notice of bail in error.

Dated the _____ day of _____, 182—.

To Mr. _____, attorney
for the defendant in error.

Your's, &c.

_____, attorney for the
plaintiff in error.

In Error.

[Title cause.]

No. 6.

_____ and _____. Unless the plaintiff in the writ of error put in better bail, within four days next after notice hereof given to the said plaintiff or his attorney, execution will issue.

The rule for better bail.

_____, clerk of the errors.

* The writ should recite the statute, yet it is remarkable how much the earlier precedents vary in the terms of such recital.

No. 7.
The notice of
justification.

In the King's Bench, in Error.

[Title cause.]

Take notice, that _____ and _____, the bail put in upon the writ of error brought in this cause, of whose additions and places of abode you have had notice, will, on _____, the _____ day of _____ next, justify themselves in this honourable court, as sufficient bail for the said plaintiff. Dated the _____ day of _____, 182—.

I am, your's, &c.

To Mr. _____, attorney
for defendant in error.

_____, attorney for the
plaintiff in error.

No. 8.
The rule for the
allowance of bail.

For this FORM, see title BAIL above.

No. 9.
Rule to certify
the record.

In the King's Bench.

_____ v. _____

Unless the plaintiff in the writ of error certify the record within eight days next after notice hereof given to the said plaintiff or his attorney, a nonsuit will be entered.

_____, clerk of the errors.

No. 10.
Rule to allege
diminution.

In the Exchequer Chamber.

_____ v. _____

Unless the plaintiff in the writ of error allege diminution within eight days next after notice hereof given to the said plaintiff or his attorney, a nonsuit will be entered.

_____, clerk of the errors.

No. 11.
Rule to assign
errors.

In the Exchequer Chamber.

_____ v. _____

Unless the plaintiff in the writ of error assign errors within eight days next after notice hereof given to the said plaintiff or his attorney, a nonsuit will be entered.

_____, clerk of the errors.

No. 12.
Assignment of
general errors.

_____ term, in the _____ year of the reign of king
George the fourth.

Afterwards, to wit, on _____, in this same term, before the justices of our lord the king of the Bench, and the barons of the Exchequer of our said lord the king, of the degree of the coif, in the Exchequer Chamber, at Westminster, comes the said _____, by _____, his attorney, and says, that in the record and proceedings aforesaid, and also in the giving the judgment aforesaid, there is manifest error in this: to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said _____ to have and maintain his aforesaid action thereof, against the said _____: there is also error in this; to wit, that by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given for the said _____ against the said _____: whereas by the law of the land, the said judgment ought to have been given for the said _____ against the said _____; and the said _____ prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

No. 13.
Joinder in error,
or plea of *in nullo*
est erratum.

And hereupon the said _____, by _____ his attorney, freely comes before the justices of our said lord the king of the Bench, and the barons of the Exchequer of our said lord the king, of the degree of the coif, in the Exchequer Chamber at Westminster aforesaid, and says, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays that the

said court of Exchequer Chamber of our lord the king now here, may proceed to the examination of the record and proceedings aforesaid, as also of the matters aforesaid, above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c. But because the court of Exchequer Chamber of our said lord the king here, is not yet advised. (*See this continuance by curia advisare vult, post.*)

Pleas in the Exchequer Chamber, at Westminster, before the right honourable Sir William Draper Best, knight, chief justice of the Bench of our sovereign lord the king; the right honourable Sir William Alexander, knight, chief baron of the Exchequer of our sovereign lord the king, of the degree of the coif; Sir James Burrough, knight; Sir James Allan Park, knight, and Sir Stephen Gaselee, knight; the three other justices of the Common Bench of our lord the king; and also before Sir Robert Graham, knight, Sir William Garrow, knight; and Sir James Hullock, knight; the three other barons of the Exchequer of our sovereign lord the king, of the degree of the coif, on ———, the ——— day of ———, in the ——— year of the reign of king George the fourth, &c.

No. 14.
The entry of the general proceedings in the Exchequer Chamber with remittitur where the original judgment was by default in error.

Our sovereign lord the king hath sent to his right trusty and well beloved Sir Charles Abbott, knight, his chief justice, appointed to hold pleas before our lord the king himself, his writ in these words, that is to say, (*here the writ is stated verbatim.*)

The answer of Sir Charles Abbott, knight, the chief justice within named.

The record and process of the plaint whereof mention is within made, with all things touching the same, to the justices and barons within specified, at the day and place within contained, I certify in a certain schedule to this writ annexed, as to me is within commanded.

CHARLES ABBOTT.

Pleas before our lord the king, at Westminster, of the term of ———, in the ——— year of the reign of our sovereign lord George the fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the Faith, &c.

The transcript of the record from the King's Bench.

Roll ———.

(*Venue*) to wit. ——— puts in his place ———, his attorney, against ———, in a plea of trespass on the case.

(*Venue*) to wit. The said ———, puts in his place ———, his attorney, at the suit of the said ———, in the plea aforesaid.

(*Venue*) to wit. Be it remembered, that in ——— term last past, before our lord the king, at Westminster, came ——— by ———, his attorney, and brought into the court of the said lord the king, then there his certain bill against ———, being in the custody of the marshal of the Marshalsea of the said lord the king, before the king himself, of a plea of trespass on the case, and there are pledges for the prosecution, (to wit) *John Doe* and *Richard Roe*, which said bill follows in these words, (to wit) *Venue* (to wit) ——— complains (*copy the declaration verbatim.*)

Imparlance, if there have been other proceedings.

And now at this day, that is to say, on ———, in this same term, *(here follows the imparlance, if any; then the judgment by default; the award of the writ of inquiry; the return of the inquisition; the signing the judgment; the misericordia, &c.; then follows the statement of the proceedings in error, thus):*

General errors assigned.

And thereupon come here, into the court of the said Exchequer Chamber, the said ——— *(the plaintiff in error)* in his proper person, and prays a day to assign error or errors in the record and proceedings aforesaid, whereupon a day is given to him by the court here, to assign error or errors in the record and proceedings aforesaid, until the ——— day of ——— next.

Pleas in the Exchequer Chamber, at Westminster, before *(as in preceding page.)*

The next sitting of the court.

At which day come here into the court of the said Exchequer Chamber, the said ——— *(plaintiff in error)*, in his proper person, and says, that in the record and proceedings aforesaid, and also in giving the said judgment, there is manifest error in this, that is to say, that it appears by the record aforesaid, that the judgment aforesaid, in form aforesaid given, was given for the said ——— *(defendant in error)*, against the said ———: whereas by the law of the land, judgment ought to have been given for the said ——— against the said ———, and therefore in that there is manifest error, and the said ——— prays the writ of our lord the king, to be directed to the sheriff of ——— aforesaid, to give notice to the said ———, that he be here, to hear the record and proceedings aforesaid, and it is granted to him. Therefore the sheriff is commanded, that by good and lawful men of his bailiwick, he give notice to the said ———, that he be here, in the court of the said Exchequer Chamber, on ———, &c.

Pleas in the Exchequer Chamber, at Westminster, before ——— *(as in preceding page; the day will be different.)*

Assignment of error.

At which day come here into the court of the said Exchequer Chamber, as well the said ———, in his proper person, as the said ——— in his proper person, and the said sheriff did not return the said writ, nor did any thing thereupon: therefore the said ———, as before, says, that in the record and proceedings aforesaid, and also in giving the said judgment, there is manifest error by alleging the error aforesaid, by him above for error assigned and alleged, and prays that the said judgment, by reason of that error and other errors in the records and proceedings aforesaid, may be reversed, annulled, and entirely held for nothing. And the said ——— says there is not any error in the record and proceedings aforesaid, or in giving the judgment aforesaid, and prays that the said court of the Exchequer Chamber of our said lord the king, at Westminster, will proceed to examine as well the record and proceedings aforesaid, as the aforesaid matters by the said ——— above assigned for error, and that the said judgment may be in all things affirmed. But because the said court of the Exchequer Chamber of our lord the king, at Westminster, is willing to advise of and upon the premises before judgment is given thereupon, a day is given to the said parties here in the said court of the said Exchequer Chamber, until ——— *(the day of adjournment)*, to hear judgment thereupon, for that the said court of the said Exchequer Chamber of our said lord the king, is not yet advised, &c.

Joinder of error.
In nullo est erratum.

(*Venue*) to wit. ——— puts in his place ———, his attorney, against ———, in a plea of correcting errors.

(*Venue*) to wit. The said ——— puts in his place ———, his attorney, at the suit of the said ———, in the plea aforesaid.

Pleas in the Exchequer Chamber, at Westminster, before
(*here the names of the judges present at the judgment in error, are inserted.*) On the ——— day of ———, in the ——— year of the reign of king George the fourth.

At which day come into the court of the said Exchequer Chamber at Westminster, as well the said ——— as the said ———, by their respective attorneys aforesaid ———. Whereupon the premises being considered, and as well the record and proceedings aforesaid, and the judgment thereon given, as also the matters above assigned for error, being by the said court of Exchequer Chamber of our said lord the king, at Westminster, diligently examined and fully understood, it appears to our said court of Exchequer Chamber of our said lord the king, at Westminster, that the judgment aforesaid is not in anywise erroneous or defective, and that in the record and proceedings aforesaid, there is not any error. THEREFORE IT IS CONSIDERED, that the judgment aforesaid be in all things affirmed, and stand in its full force, strength, and effect: the said matters above assigned and alleged for error in any wise notwithstanding. AND IT IS FURTHER CONSIDERED, that the said ——— do recover against the said ———, £—, adjudged to the said ——— at his request, by the said court of Exchequer Chamber of our said lord the king, at Westminster, according to the form of the statute in that case made and provided for his damages, costs, and charges which he hath sustained by reason of the delay of the execution of the judgment aforesaid, by the prosecution of the said writ of error: Whereupon the record and proceedings of the said justices of the court of Common Bench, and the said barons of the said court of Exchequer, before them had in the premises, by the said justices and barons, before our said lord the king, whosoever, &c. are remitted according to the form of the said statute made in the said 27th year of the said reign of her late majesty queen Elizabeth, &c.

Affirmance.

Costs, &c.

Remittitur.

In the Exchequer Chamber.

[*Title the cause.*]

No. 15.

In error.

Notice of motion for interest.

Take notice, that this honourable court will be moved on ———, the ——— day of ———, that it be referred to the clerk of this court to ascertain the amount of the interest upon the final judgment obtained by the above-named defendant in error against the above-named plaintiff in error, in his majesty's court of King's Bench, from the time of entering up the final judgment until the affirmance of the judgment in this court, and that such interest may be added to the damages for which such final judgment was entered up. Dated this ——— day of ———

[*Copy to be served on plaintiff's attorney two days previous to affirmance day.*]

In the Exchequer Chamber.

[*Title the cause.*]

No. 16.

In error.

Affidavit of the description of action, and of service of notice.

———, of ———, maketh oath and saith, that the original action brought by the above-named defendant in error, against the above-named plaintiff in error, was upon an instrument commonly

called a promissory note (*or bill of exchange, as the case may be*), for the sum of £—, as appears to this deponent by the declaration in the said cause, and that final judgment was signed in the said cause on the — day of —, for the sum of £—, for principal and interest on the said note (*or bill of exchange*), and £— costs, whereon the writ of error now depending was brought, and general errors assigned; and this deponent further saith, that he did, on the — day of — instant, serve Mr. —, the attorney or agent for the plaintiff in this cause, with a notice in writing, a copy whereof is hereunto annexed, by delivering the same to the clerk or agent or agent of the said Mr. —, at his house in —.

(Signed) —.

Sworn —, before —,
(*One of the justices of the Common Pleas,
or a baron of the Exchequer.*)

No. 17.
Precipe for writ
of error in House
of Lords.

See No. 1, *ante*, (but say "Writ of error in parliament.")

No. 18.
Writ of error
direct to House
of Lords, on
error on judg-
ment in K. B.

George, (&c.) To our right trusty and well beloved Sir Charles Abbott, knight, our chief justice assigned to hold pleas in our court before us, greeting: Because in the record and proceedings, and also in the giving of judgment in a plaint, which was in our court before us by our writ, between — and — (*as in the precipe*) late of —, of a plea of trespass on the case (*as the plea is*) as it is said manifest error hath intervened to the great damage of the said —, as by his complaint we are informed, we, being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then without delay you distinctly and openly send under your seal the record and proceedings aforesaid, with all things touching the same to us in our parliament, at the next session thereof, to be holden on the — day of — next ensuing, and this writ, that the record and proceedings aforesaid being inspected we may further cause to be done thereupon, with the assent of the lords spiritual and temporal in the same parliament, for correcting that error, what of right and according to the law and custom of England, ought to be done. Witness ourself at Westminster, (&c.)

No. 19.
Writ of error in
House of Lords
from the Exche-
quer Chamber.

George, (&c.) To our right trusty and well beloved Sir Charles Abbott, knight, our chief justice assigned to hold pleas in our court before us, greeting: Whereas in the record and proceedings, and also in the giving of judgment in a plaint which was in our court before us by bill between — and — of a plea of trespass on the case (*as the plea is*) which said record and proceedings, by reason of error happening therein, we caused to be brought before the justices of the Common Bench, and the barons of our Exchequer into our Exchequer Chamber, and the judgment thereupon is affirmed, as it is said manifest error hath intervened to the great damage of the said —, as by his complaint we are informed, we, being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, that if judgment be thereupon given and affirmed, (*as before*) then without delay, (&c. *as the last.*)

No. 20.
Writ of error in
House of Lords
from K. B. on
judgment in C. P.

George, (&c.) To our right trusty and well beloved Sir Charles Abbott, knight, our chief justice assigned to hold pleas in our court before us, greeting: Because in the record and proceedings, and also

in the giving of judgment in a plaint, which was before Sir William Draper Best, knt. and his companions, our justices of the Bench by our writ between ——— and ———, late of ———, (*as in the proceedings*) of a plea of trespass on the case (*as the plea is*) and also in the affirmance of the same judgment in our court before us, as it is said, manifest error hath intervened to the great damage of the said ———, as by his complaint we are informed, we, being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send under your seal the record and proceedings aforesaid, with all things touching the same, to us in our present parliament and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon, with the assent of the lords spiritual and temporal (*as in No. 18.*)

See No. 3, *ante*.

See No. 9, *ante*.

——— v. ———. Afterwards, to wit, on the ——— day of ———, in the ——— year of the reign of our sovereign lord George the fourth, of the United Kingdom of Great Britain and Ireland now king, before our said lord the king, and the peers of the realm, in this present parliament, at Westminster, in the county of Middlesex, assembled, the said ——— comes, by ——— his attorney, and says, that in the said record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the said declaration aforesaid, and the matters contained therein, are not sufficient in law for the said ——— to have and maintain his aforesaid action against the said ———. There is also error in this, to wit, that by the said record it appears, that the said judgment in form aforesaid given, was given for the said ——— against the said ———; whereas by the law of the land, the said judgment ought to have been given for the said ——— against the said ———: and the said ——— prays that the judgment aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

Afterwards, to wit, on the ——— day of ———, in the ——— year of the reign of our sovereign lord George the fourth, of the United Kingdom of Great Britain and Ireland king, defender of the Faith, before our said lord the king, and the peers of the realm in this present parliament, at Westminster, in the county of Middlesex, assembled, the said ———, by ——— his attorney, comes and says, that there is manifest error in the record and proceedings aforesaid, and also in giving and affirming the judgment aforesaid, in this, to wit, that by the said record aforesaid, it appears that the judgment aforesaid, given by the said court of our said lord the king, before the king himself at Westminster aforesaid, was given for the said ——— against the said ———; whereas by the law of the land, the judgment ought to have been given for the said ——— against the said ———; therefore in that there is manifest error; there is also error in affirming the judgment aforesaid, because he says, that the judgment aforesaid was affirmed in the court of our lord the king, of

No. 21.
The allowance.

No. 22.
The rule to transcribe.

No. 23.
General errors assigned in the House of Lords in parliament.

No. 24.
Errors assigned in House of Lords in parliament, after affirmance in the Exchequer Chamber.

the Exchequer Chamber, at Westminster aforesaid, before the justices of the Common Bench and the barons of the said Exchequer, whereas no such affirmance of the said judgment ought to have been thereupon given, but by the law of the land the said judgment ought to have been reversed, and therefore in that there is manifest error: and the said _____ prays that the judgment aforesaid, for the said errors aforesaid, and for other errors in the said record and proceedings aforesaid, may be reversed, annulled, and entirely held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment and affirmance thereof as aforesaid, and that the said _____ may rejoin to the errors above assigned, &c.

No. 25.
Precipe for writ
of error, C. P.
to K. B.

(*Venue.*) Writ of error for _____ against _____ case, (or whatever the action is) on a judgment in the court of Common Pleas returnable _____ wheresoever, &c. (if by bill the return is on a day certain.)

(*Date.*)

_____, Attorney.

No. 26.
Writ of error
brought in K. B.
on a judgment in
C. P. by original.

George, (&c.) To our trusty and well beloved Sir William Draper Best, knight, our chief justice of the Bench, greeting: Because in the record and process, and also in the giving of judgment of a plaint, which was in our court before you and your companions our justices of the Bench, by our writ between _____ and _____, late of _____, of a certain debt which the said _____ demanded of the said _____ (or of trespass on the case) manifest error hath intervened to the great damage of the said _____, as by his complaint we are informed, we, willing that the error, if any there be, should be corrected in due manner, and fully and speedy justice done to the parties aforesaid, in this behalf, do command you, that if judgment thereof be given thereupon, then under your seal you do distinctly and openly send the record and proceedings of the plaint aforesaid, with all things concerning the same and this writ, so that we may have them _____ (a general return) wheresoever we shall then be in England, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to the law and custom of England ought to be done. Witness ourself at Westminster, &c.

No. 27.
The allowance.

See No. 3, ante.

No. 28.
The notice of
bail.

This will be the same as No. 5, ante; *mutatis mutandis*.

No. 29.
The rule for
better bail.

See No. 6, ante.

No. 30.
The notice of
justification.

See No. 7, ante. If in vacation, the notice must be for justifying at a judge's chambers, C. P. instead of open court.

No. 31.
Note on the re-
cognizance in er-
ror, C. B. to K. B.

See No. 4, ante. The difference observable in the recognizances in the two courts is this, viz. that in error in the Exchequer Chamber the bail engage to pay the sum recovered by the judgment, and such further costs of suit, sum and sums of money as shall be awarded for delay of execution; but in this court, i. e. C. P. the bail engage to pay the sum recovered by the judgment, as also all such costs and damages as shall be awarded for execution.

(*Venue.*) To wit. If ——— (the original plaintiff) shall give you security to prosecute his suit, then put by sureties and safe pledges ——— (the original defendant) late of ———, in the said county ———, that he be before our justices at Westminster ——— (the first term the judgment is of) to shew (here copy the declaration to the end) as it is said, &c.

No. 32.
The *precipe* for the original.

See No. 9, *ante*.

(*Venue.*) *Scire facias quare executionem non*, for ——— defendant, at the suit of ———, plaintiff in error for £—— damages, in case (or as the action may be.)
(*Date.*) ———, Attorney.

No. 33.
Rule to certify the record or transcribe.

No. 34.
Precipe for scire facias, quare executionem non.

George, (&c.) To the sheriff of ———, greeting: Whereas ———, lately in our court before Sir William Draper Best, knight, and his companions, then our justices of the Bench at Westminster, by our writ, and by * the judgment of the same court recovered against ———, late of ———, £——, for his damages which he the said ——— had sustained as well by occasion of the said ——— not having performed certain promises and undertakings lately made by him to the said ———, as for his costs and charges by him about his suit in that behalf expended, whereof the said ——— is convicted, as by inspection of the record and proceedings thereof, which for certain matters of error we lately caused to be brought into our said court before us, manifestly appears to us of record: and now on the behalf of the said ———, we have been informed that although judgment be given in form aforesaid yet execution of the said damages still remains to be made to him, wherefore the said ——— hath humbly entreated us to provide him a proper remedy in this behalf: and we, being willing that what is just should be done on this occasion, command you, that by honest and lawful men of your bailiwick, you make known to the said ———, that he be before us on ———, wheresoever we shall then be in England, to shew if he has or knows of any thing to say for himself why the said ——— ought not have his execution against him of the damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient to him so to do, and further to do and receive what our said court before us shall consider of him in this behalf, and have you there the names of those by whom you shall so make known to him, and this writ. Witness Sir Charles Abbott, knight, at Westminster, the ——— day of ———, in the ——— year of our reign.

No. 35.
Scire facias quare executionem non.

Ellenborough and Markham.

See title DIRECTION OF WRITS for the proper direction where judgment given in an inferior court; for in that case the *scire facias*, must be properly directed to the judge of such court, agreeably to the following form:

George, (&c.) To ——— (See title DIRECTION OF WRITS, *ante*.) Whereas ——— lately in our court of the city aforesaid, before you without our writ, and by the judgment, &c. (from the asterisk * in the last precedent to the end.)

No. 36.
Sci. fa. quare, &c. where original judgment in an inferior court.

No. 37.
Rule on *sci. fa.*

In the King's Bench.

_____, Plaintiff,
_____, Defendant. } In Error.

Rule for judgment on *sci. fa. quare executionem non.*

(Date.)

_____, Attorney.

No. 38.
Rule to assign
errors.

No. 39.
Entry of a *non*
proes after *scire*
facias quare ex-
ecutionem non in
error, for want
of assigning
errors.

Day given to as-
sign errors.

Plaintiff in error
makes default.

Judgment signed
the ____ day of
____, 182—.

Mercy.

No. 40.
Return of two
nikils referred to
in the last pre-
cedent.

_____ v. _____
(the day) to assign errors on record.

Entered.

Afterwards, to wit, on _____ in this same term, before our lord the king at Westminster, comes the said _____, by his attorney aforesaid, and says that execution of the judgment aforesaid still remains to be made unto him; therefore he prays the writ of the lord the king to be directed to the sheriff of the county of _____ aforesaid, that he make known to the said _____ to be before the said lord the king wheresoever, &c. to shew if any thing he has or knows to say for himself, why the said _____ ought not to have execution of his damages, costs, and charges aforesaid, according to the form and effect of the judgment aforesaid; and it is granted to him, &c. by which it is commanded to the sheriff aforesaid, that by good and lawful men of his bailiwick, he make it known to the said _____ that he be before the lord the king (*the return of the scire facias*) to shew in form aforesaid, if, &c. and further, &c. the same day is given to the said _____, &c. at which day the said _____, by his attorney aforesaid comes before our lord the king at Westminster, and offers himself against the said _____ in the plea aforesaid, and the sheriff, to wit _____, sheriff of the said county of _____, returns (*if there were two nikils returned, insert them as in the following precedent*) that by virtue of the said writ to him directed by _____ good, &c. he has given notice to the said _____ to appear, &c. to shew cause, &c. as by that writ he was required; and the said _____ being solemnly called, doth not come but makes default, and thereupon the said _____ says that the said _____ hath assigned no error or errors in the record and proceedings aforesaid, or in giving the judgment aforesaid. Therefore a day is given to the parties aforesaid to come before our lord the king on _____, wheresoever, &c. that is to say, for the said _____, to assign error or errors in the record and proceedings aforesaid, or in giving the judgment aforesaid. At which day before our lord the king at Westminster comes the said _____, by his attorney aforesaid, and the said _____ being solemnly called, doth not come but again makes default; nor has he further prosecuted the said writ of error against the said _____. THEREFORE IT IS CONSIDERED that the said _____ do recover against the said _____, as well his damages aforesaid as also £_____ adjudged to him by the said court of our lord the king now here, according to the form of the statute in such case made and provided, for his damages, costs, and charges which he has sustained by occasion of the delay of execution of the judgment aforesaid, by means of the prosecution of the said writ of error, which damages in the whole amount to £_____, and that the said _____ have execution thereof, &c. and the said _____ in mercy, &c.

(*The precedent commences with the sheriff's return*) that the said _____ hath not any thing in his bailiwick where or by which he can give him notice as by that writ he was commanded; nor is the said _____ found in the same, and the said _____ being so-

lemnly called, doth not come: therefore as before the said sheriff is commanded that by good, &c. he make known to the said ——— that he be before our lord the king on (*the return of the second scire fucias quare executionem non*) to shew in form aforesaid if, &c. and further, &c. the same day is given to the said ———, there, &c. At which day the said ———, by his attorney aforesaid, comes before our lord the king at Westminster, and offers himself against the said ———, and the sheriff as before returns that the said ——— hath not any thing, &c. nor is the said ——— found. And the said ——— being solemnly called, doth not come.

In the King's Bench.

——— term, in the ——— year of the reign of king George the fourth.

——— v. ———. Afterwards, to wit, on ———, in this same term before our lord the king at Westminster, comes the said ———, by ———, his attorney, and says, that in the record and proceedings aforesaid, and also in the giving the judgment aforesaid there is manifest error in this, (to wit) that the declaration aforesaid and the matters therein contained, are not sufficient in law for the said ——— to have and maintain his aforesaid action whereof against the said ———; there is also error in this, (to wit) that by the record aforesaid, it appears that the said Nicholas was attached to answer to the said ———; yet no original writ between the parties aforesaid, in the plea aforesaid, is filed of record nor remains of record in the said court of the said lord the king of the Bench at Westminster aforesaid, therefore in that there is manifest error; there is also error in this, that it appears by the record aforesaid, that the judgment aforesaid in form aforesaid given, was given for the said ——— against the said ———, whereas by the law of the land the said judgment ought to have been given for the said ——— against the said ———. And the said ——— prays a writ of the lord the king to be directed to the (*custos brevium*) of the said court of the Bench at Westminster to certify to the said lord the king the truth of the same, and it is granted to him, &c. and the said ——— prays that the judgment aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing; and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

No. 41.
Assignment of error, that there is no original writ.

——— term, in the ——— year of the reign of king George the fourth.

——— v. ———. Afterwards, to wit, on ———, in this same term before our lord the king at Westminster, comes the said ———, by ———, her attorney, and says that in the record and proceedings aforesaid, and also in the giving the judgment aforesaid, there is manifest error in this, (to wit) that the said declaration, in the said record set forth, and the matters therein contained, are not sufficient in law for the said ——— to have and maintain his said action against the said ———, therefore in this there is manifest error; there is also error in this, (to wit) that whereas by the said record it appears that the said judgment in form aforesaid given, was given for the said ———, against the said ———, yet the said judgment, by the law of the land, ought to have been given for the said ——— against the said ———, therefore in this there is manifest error; there is also error in this, (to wit) that by the record

No. 42.
Assignment of no warrant of attorney; no original. Writs of original and of certiorari prayed.

No warrant of attorney. aforesaid, it appears that the said _____ appeared by _____, his attorney, against the said _____, yet there is no warrant of attorney filed or remaining of record in the said court of our said lord the king of the Bench, between the parties aforesaid, to warrant the said _____ to be attorney for the said _____ against the said _____ in the plea aforesaid; therefore in this there is manifest error. There is also error in this, (to wit) that by the record aforesaid, it appears that the said _____ was attached to answer the said _____ in the plea aforesaid, yet no original writ between the parties aforesaid, in the plea aforesaid, is filed or remaining of record in the custody of the keeper of the writs of the court of our lord the king of the Bench; therefore in this there is manifest error. And hereupon the said _____ prays the writs of our said lord the king, (to wit) one writ to be directed to _____, chief justice of our said lord the king of the Bench, and the other to _____, keeper of the writs and rolls of the court of our said lord the king, to certify to the said lord the king the truth of the premises; and they are granted to her, &c.: and the said _____ also prays that the judgment aforesaid for the errors aforesaid, and other the errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that the said _____ may be restored to all things which she hath lost by occasion of the said judgment, and that the said _____ may rejoin to the errors aforesaid.

No. 43.
The joinder in error; the writs of *certiorari* not being returned and filed. The chief justice and the *custos breviarum non mis. brevia.*

Whereupon _____ next after _____ is given by the said court of our said lord the king to return to the court of our said lord the king, before the king himself at Westminster, the said several writs of *certiorari* above prayed; and the same day is given to the said _____, there, &c. And the said chief justice of the court of our said lord the king of the Bench, and the said keeper of the said writs and rolls of the said lord the king that now is, did not send the said several writs at the said day, nor either of them, &c. nor did any thing thereupon, nor either of them did any thing thereupon.

And thereupon the said _____, by _____ his attorney, freely comes here into court, and the errors aforesaid being heard, now says that neither in the record and the said proceedings aforesaid, nor in the giving of judgment aforesaid in any thing is there error, and prays also that the court of our said lord the king now here, may proceed in like manner to the examination as well of the record and proceedings aforesaid as the matters aforesaid, by the said _____, for error assigned and alleged as aforesaid; and that the judgment aforesaid may be in all things affirmed: But because the court of our said lord the king is not yet advised what judgment to give of and upon the premises, a further day is given to the parties aforesaid before our lord the king until _____ wheresoever, &c. to hear the judgment aforesaid, for that the court of our said lord the king now here, is not yet advised thereof, &c.

(Counsel's name.)

No. 44.
Joinder in error after return of *certiorari*. No warrant of attorney.

And the said _____, by _____ his attorney, comes, and says that in the said record and proceedings, as also in giving the said judgment, there is manifest error in this, (to wit) that there is not any warrant of attorney filed or remaining of record in the said court of our said lord the king of the Bench, between the parties aforesaid, in the plea aforesaid, to warrant the said _____ to be attorney for the said _____, against the said _____, in the plea aforesaid; therefore in that also there is manifest error. Wherefore the said _____ prays

the writ of our lord the king to be directed to ———, chief justice of the court of our said lord the king of the Bench, and it is granted to him, &c. Whereby it is commanded to the chief justice of the court of our lord the king of the Bench aforesaid, that he search the rolls and other memorandums of the warrants of attorney of Middlesex, of ——— term, in the ——— year of the reign of our said lord the king, being in his custody on record, and that he without delay certify to our said lord the king wheresoever, &c. what he shall thereupon find in the said rolls and memorandums, together with the writ of our said lord the king to him thereupon directed, &c.; which said chief justice of the court of our said lord the king of the Bench aforesaid returned, and certified into our said lord the king, that, by virtue of the said writ of *certiorari*, he had searched the records and other remembrance rolls of the warrants of attorney, for the county of ———, in his custody, filed of record of ——— term, in the ——— year of the reign of our said lord the king; and that there was a warrant of attorney filed to warrant the said ——— to be attorney for the said ———, against the said ———, in the plea aforesaid, in his custody, filed of record of the term aforesaid, the tenor of which said warrant of attorney, as fully as the same remained in his custody, filed of record, the said chief justice thereby certified to the said lord the king, as appeared by the schedule thereunto annexed, as the said chief justice was in the said writ of *certiorari* commanded, which said schedule so annexed to the said writ of *certiorari*, follows in these words, (to wit.) The rolls of attornies received before ———, chief justice of the court of our said lord the king of the Bench, and his companions, of ——— term, in the ——— year of the reign of our sovereign lord George, (&c. then follows the warrant of attorney, *verbatim*) which said writ of *certiorari*, together with the return thereof among the records, without day, of ——— term aforesaid is filed. And hereupon afterwards, to wit, on ———, in the ——— year of the reign of the said lord the king, the said ———, by his attorney aforesaid, freely comes here into court, and says that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the court of the said lord the king now here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid for error assigned; and that the judgment aforesaid in form aforesaid given, may be in all things affirmed. But because the court of the said lord the king now here is not advised what judgment to give of and upon the premises, day is given therefore to the parties aforesaid to come before the said lord the king, on ——— (*the day mentioned in the rule for the consilium*) wheresoever the said lord the king shall then be in England, to hear the judgment aforesaid, for that the court of the said lord the king now here is not yet advised thereof, &c.

(*Counsel name.*)

Afterwards, to wit, on ———, in this same term, comes the said ———, by ——— his attorney, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, (to wit) that the declaration aforesaid, and the matter therein contained, are not sufficient in law for the said ——— to have and maintain his aforesaid action thereof against the said ———: There is also error in this, (to wit) that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the aforesaid ———, against the said ———, whereas by the law of the land, judgment ought

Certiorari prayed.
Award of the
certiorari.

Return.

No. 45.
General errors
assigned in B. R.
on a judgment
in C. B.

to have been given for the said ——— against the said ———, and therefore in this there is manifest error. And the said ——— prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing; and that the said ——— may be restored to all things which he hath lost by occasion of the said judgment, &c.

No. 46.

The general
joinder in error,
or in nullo est er-
ratum.

And thereupon afterwards, to wit, on ———, in ——— term, in the ——— year of the reign of the said lord the king, the said ———, by ——— his attorney, freely comes here into court, and says, that there is no error either in the record and proceedings aforesaid, or in the giving the judgment aforesaid; and he prays that the court of the said lord the king now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above for error assigned, and that the judgment aforesaid, in form aforesaid given, may in all things be affirmed. But because the court of the said lord the king now here is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid, to come before the said lord the king on ——— wheresoever the said lord the king shall then be in England, to hear judgment aforesaid, for that the court of the said lord the king now here is not yet advised thereof, &c.

No. 47.

The general
joinder in error
after certiorari
to certify ori-
ginal issued.

In Error } Which said writ of *certiorari* so prayed and granted,
—— & —— } follows in these words, (to wit)

George, &c. (*proceed verbatim with the writ of certiorari*) which said keeper of the writs, rolls, and records, returned and certified unto our said lord the king, that by virtue of the said writ of *certiorari* he had searched the original writs directed to the sheriff of ———, in his custody, filed of record, of ——— term, in the ——— year of the reign of our said lord the king; and that there was an original writ between the parties in the said writ of *certiorari* named, in a plea of trespass on the case, directed to the sheriff of ———, in his custody, filed of record, of the term aforesaid, the tenor of which said original writ, together with the return and indorsement thereof, as fully as the same remained in their custody, filed of record, the said keeper of the writs, rolls, and records aforesaid, thereby certified to the said lord the king, as appeared by the schedule thereunto annexed, as the said keeper was in the said writ of *certiorari* commanded: And which said schedule so annexed to the said writ of *certiorari* follows in these words, (to wit) George, &c. To the sheriff of ———, greeting: If ——— shall give you security to prosecute his suit, then put under sureties and safe pledges, ———, late of ———, in your county ———, that he be before our justices at Westminster, on ———, to shew for that whereas (*copy the original writ to the end, then add the sheriff's return indorsed thereon, viz.*) Pledges to prosecute, *John Doe* and *Richard Roe*. The within-named ——— hath not any thing in my bailiwick whereby he can be attached: the answer of ———, sheriff. Which said writ of *certiorari*, together with the return of the same among the records without day, of ——— term aforesaid is filed. And hereupon, afterwards, to wit, on ———, in ——— term, in the ——— year of the reign of the said lord the king, the said ———, by ——— his attorney, freely comes here into court, and says, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the court of the said lord the

king now here, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid, for error assigned; and, that the judgment aforesaid, in form aforesaid given, may be in all things affirmed. But because the court of the said lord the king now here, is not yet advised what judgment to give of and upon the premises, a day is given, therefore, to the parties aforesaid, to come before the said lord the king, on ———, wheresoever the said lord the king shall then be in England, to hear the judgment aforesaid, for that the court of the said lord the king now here, is not yet advised thereof &c.

——— next after ———, in the ——— year of
King George the fourth.
——— v. ——— } ——— next after ———, is appointed to hear
In Error. } the counsel for both parties. Upon the motion of
Mr. ———.

No. 48.
Rule for a *consilium*.

By the court.

At which day, before our lord the king at Westminster, come the parties aforesaid, by their attornies aforesaid, whereupon, as well the record and proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid, by the said ———, above for error assigned, being seen and fully understood by the court of the said lord the king now here, and mature deliberation being had thereupon, for that it appears to the court of our said lord the king now here, that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid; therefore it is considered, that the judgment aforesaid, given in form aforesaid, shall be in all things affirmed. And it is further considered, that the said ——— do recover against the said ———, as well his damages aforesaid, as also £———, adjudged to him by the court of our lord the king now here, according to the form of the statute in such case made and provided, for his damages, costs, and charges, which he has sustained, by occasion of the delay of execution of the judgment aforesaid, by means of the prosecution of the said writ of error, which said damages, costs, and charges, in the whole, amount unto £———, and that he have execution thereof, &c. and the said ——— in mercy, &c.

No. 49.
Affirmance to be entered on the roll after argument.

As yet of ——— term, 182—

Witness, Sir Charles Abbott, knight.

England, to wit. Our lord the king hath sent to his right trusty and well-beloved Sir William Draper Best, knight, his writ, closed in these words:

George, (&c.) To our right trusty and well-beloved Sir William Draper Best, knt. our chief justice of the Bench, greeting: Because in the record and proceedings, and also in the giving of judgment in the plaint which was in our court before you and your companions, our justices of the Bench, by our writ, between ——— and ———, in the county of ———, of a certain debt which the said ——— demands of the said ———, manifest error hath been intervened, to the great damage of the said ———, as by his complaint we are informed; we, being willing that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, do command you, that if judgment thereof be given, then you send to us, distinctly and openly, the record and proceedings of the plaint aforesaid, with all things concerning the same, and this writ, on ———,

No. 50.
A form of entry of the whole proceedings on the roll in a cause in error; where the original judgment was for the defendant upon demurrer, C. P. reversed in K. B.
Writ of error.

wheresoever we shall then be in England, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right, and according to the law and custom of England ought to be done. Witness ourself, at Westminster, the ——— day of ———, in the ——— year of our reign.

The return of
the chief justice.

The answer of Sir William Draper Best, knight, the chief justice within named.

The record and proceedings, whereof mention is within made, follow in these words, to wit.

The record.

Pleas, at Westminster, before Sir William Draper Best, kn. and his companions, justices of our lord the king of the Bench, of ——— term, in the ——— year of the reign of our sovereign lord George the fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the Faith, &c.

Roll ———.

(Venue), to wit. ——— was summoned to answer ——— of a plea, that the said ——— render to the said ———, the sum of £——, of good and lawful money of Great Britain, which the said ——— owes to, and unjustly detains from the said ———: And thereupon the said ———, by ——— his attorney, saith, That whereas the said ———, on the ——— day of ———, in the year of our lord ———, at ———, in the county of ———, by his certain writing obligatory, sealed with his seal, acknowledged himself to be held and firmly bound unto the said ——— in the said sum of £——, above demanded, to be paid to the said ———, when the said ——— should be thereunto afterwards requested: yet the said ———, although afterwards requested so to do, hath not as yet paid the said sum of £——, above demanded, or any part thereof, to the said ———, but to pay the same, or any part thereof, to the said ———, the said ——— hath hitherto wholly refused, and still refuses so to do; wherefore the said ——— saith that he is injured, and hath sustained damage to the value of £——, and therefore he brings suit, &c.; and the said ——— brings here into court the said writing obligatory, sealed as aforesaid, which gives sufficient evidence to the said court here of the debt aforesaid, in form aforesaid, the date whereof is the day and year in that behalf above mentioned. And the said ———, by ——— his attorney, comes and defends the wrong and injury, when, &c. and says, that the said declaration, and the matters therein contained, in manner and form, as the same are above stated and set forth, are not sufficient in law for the said ——— to have or maintain his aforesaid action thereof against the said ———, to which said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, the said ——— is not under any necessity, nor in any wise bound by the law of the land to answer, and this he is ready to verify; wherefore, for want of a sufficient declaration in this behalf, the said ——— prays judgment, and that the said ——— may be barred from having or maintaining his aforesaid action thereof against him, &c.

Demurrer.

(Counsel's name.)

Joinder in demurrer.

And the said ——— saith, that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for the said ——— to

have and maintain his aforesaid action thereof against the said ———, and the said ——— is ready to verify and prove the same, as the court here shall direct and award; wherefore, inasmuch as the said ——— hath not answered the said declaration, nor hitherto in any manner denied the same, the said ——— prays judgment and his debt aforesaid, together with his damages by him sustained, on occasion of the detention thereof, to be adjudged to him, &c.

(Counsel's name.)

And because the justices here in court are not yet advised what judgment to give in the premises whereon the said parties have put themselves upon the judgment of the court, a day is given to the said parties aforesaid here, on ———, to hear their judgment thereupon, for that the said justices here are not yet advised thereof: at which day, before our said justices at Westminster, came the parties aforesaid, by their attorneys aforesaid; and hereupon all and singular the premises, whereof the said parties have put themselves on the judgment of the court, being seen and by the justices here fully understood, and mature deliberation being thereupon had, it seems to the said justices here, that the declaration aforesaid, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said ——— to have and maintain his aforesaid action thereof against the said ———. Therefore it is considered that the said ——— take nothing by his writ aforesaid, but that he and his pledges to prosecute be, in mercy, &c. and that the said ——— do go thereof without day, &c. And it is further considered by the justices here, that the said ——— do recover against the said ———, £——, for his said costs and charges by him laid out about his defence in this behalf, by the said justices here adjudged to the said ———, with his assent, according to the form of the statute in such case made and provided, and that the said ——— may have execution thereof, &c.

Afterwards, to wit, on ——— in this same term, before our sovereign lord the king, at Westminster, comes the said ——— by his attorney, and saith, That in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, (to wit) that the judgment aforesaid, in form aforesaid given, was given for the said ——— against the said ———, whereas, by the law of the land, the said judgment ought to have been given for the said ——— against the said ———, and this the said ——— is ready to verify; and the said ——— prays a writ of the said lord the king, to warn the said ——— to be before the said lord the king, to hear the record and proceedings aforesaid, and the matter aforesaid, for error assigned, and it is granted to him, &c. by which it is commanded to the sheriff of the county aforesaid, that by good and lawful men of his bailiwick, he make known to the said ——— that he be before the lord the king ——— wheresoever he shall then be in England, to hear the record and proceedings aforesaid, and the matter aforesaid, for error assigned, and further to do and receive what the said court of the said lord the king shall consider of him in this behalf, the same day is given to the said ———. At which day, before our said lord the king, comes the said ——— by his attorney aforesaid, and offers himself against the said ——— and the sheriff, to wit, ———, the sheriff of the said county, returns, that by virtue of the said writ to him directed, he had caused it to be

Continuance.

Judgment.

General error assigned.

Sci. fa. ad audiendum errores prayed.

made known to the said ——— that he be before the king at the time in the said writ mentioned, by ——— and ———, &c. good, &c. as by the said writ he was commanded, &c. and the said ——— being solemnly called, comes, by ——— his attorney; whereupon the said ———, as before, saith, that in the record and process aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the judgment aforesaid, in form aforesaid given, was given for the said ——— against the said ———, whereas, by the law of the land, the said judgment ought to have been given for the said ——— against the said ———, and this the said ——— is ready to verify; and the said ——— prays, that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost, by occasion of the said judgment, &c.

Joinder in error. And the said ———, by his attorney aforesaid, comes and saith, That there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the court of the said lord the king now here, may proceed to examine as well the record and proceedings aforesaid, as the matter aforesaid, for error assigned, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed; but because the court of the said lord the king now here is not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, to come before the said lord the king ———, where-soever he shall then be in England, to hear the judgment aforesaid, for that the court of the said lord the king now here is not yet advised thereof, &c.

Judgment. At which day, before our lord the king at Westminster, come the parties aforesaid, by their attorneys aforesaid; whereupon, as well the record and proceedings aforesaid, and the judgment aforesaid, in form aforesaid given, as the matter aforesaid, by the said ——— above for error assigned, being seen and fully understood by the court of the said lord the king now here, and mature deliberation had thereupon, for that it appears to the court of our lord the king now here, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error; therefore it is considered that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings aforesaid, be reversed, annulled, and altogether held for nothing, and that the said ——— do recover against the said ——— his debt aforesaid, and also £—— for his damages which he hath sustained, as well by means of detaining the said debt, as for his costs and charges by him expended about his suit in this behalf, by the court of our said lord the king now here adjudged to the said ——— with his assent, and that he have execution thereof, &c. And the said ———, in mercy, &c.

No. 51. George, (&c.) To the sheriff of ———, greeting: Whereas ———, lately, to wit, in ——— term, in the ——— year of our reign, in our court, before Sir William Draper Best, knight, and his companions, then our justices of the Bench, at Westminster, by our writ, and by the judgment of the same court recovered against ——— £—— for his damages which he had sustained, as well on occasion of the detention of the said debt, as for his costs and charges by him

Writ of restitution.

about his suit in that behalf expended, whereof the said _____ was convicted, as by the record and proceedings thereof, which, for certain causes of error, we lately caused to be brought into our court before us, appears to us of record, and by reason of divers errors in the said record and proceedings, and also in giving the judgment aforesaid, we have reversed and totally annulled the same. And we have further considered in our said court before us, that the said _____ be restored to all things which he hath lost on occasion of the judgment aforesaid. And whereas the said _____ on pretence of the said former judgment, hath had his execution of the damages aforesaid, and is yet possessed thereof, as we have been informed; therefore we command you, that if it can be made appear to you that the said _____ hath had his execution of the damages aforesaid, by virtue of the judgment aforesaid, then, without delay, you cause the said _____ to have full restitution of the said £_____, and if you cannot cause him to have restitution thereof, then that of the goods and chattels of the said _____ in your bailiwick, you cause to be made the said £_____, and cause that money to be delivered without delay to the said _____, or that you take the said _____ if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us on _____ wheresoever we shall then be in England, to restore and make satisfaction to the said _____ of the said £_____. And in what manner you shall execute this our writ, make appear to us on _____ wheresoever we shall then be in England, and have there this writ. Witness, Sir Charles Abbott, knight, at Westminster, the _____ day of _____, in the _____ year of our reign.

Ellenborough and Markham.

See No. 1. Say "writ of error *coram nobis*," or "*vobis*," as the case may require.

George, (&c.) To our justices assigned to hold pleas in our court before us, greeting: Forasmuch as in the record and proceedings, and also in the giving of judgment in a plaint which was in our court before us, by our writ, between _____ and _____, of a certain debt of £_____, which the said _____ demanded of the said _____, (as the plea is) as it is said, which said record and proceedings now remain before us, manifest error hath intervened, to the great damage of the said _____ as by his complaint we are informed, we, being willing that the error, if any there be, be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then the record and proceedings aforesaid being inspected, you cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of England, ought to be done. Witness ourself at Westminster, the _____ day of _____, in the _____ year of our reign.

George, (&c.) To our trusty and well-beloved Sir William Draper Best, knight, our chief justice of the Bench, greeting: Because in the record and proceedings, and also in giving of judgment in a plaint which was in our court before you and your companions, our justices of the Bench, by our writ, between _____ and _____, late of _____, of a plea of trespass on the case, manifest error hath intervened, to the great damage of the said _____, as we, from the complaint of the said _____, are informed; we, being willing that the error,

No. 52.
Precipe for writ
of error *coram*
nobis.

No. 53.
Writ of error
coram nobis, i. e.
in K. B.

No. 54.
Writ of error
coram vobis in
error from C. P.
to K. B.

if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, do command you, that if judgment thereof be given, then, under your seal, you directly and openly send the record and proceedings of the plaint aforesaid, with all things concerning them, and this writ, so that we may have them on ———, wheresoever we shall then be in England, that the record and proceedings aforesaid being inspected, we may cause to be done thereupon for correcting that error, what of right, and according to the law and custom of England, ought to be done. Witness, (*as above*).

No. 55.
Rule for the allowance of error *coram nobis* or *vobis*.

——— v. ———. It is ordered, That the writ of error issued between the parties in this cause be allowed, and upon the plaintiff in error putting in and justifying his bail within ——— days next ensuing, that further proceedings be stayed on the judgment in the original action, until the said writ of error now depending between the parties be determined.

No. 56.
The recognisance in error *coram nobis* or *vobis*.

——— of ——— }
——— of ——— } *Naming the Bail.*

You severally acknowledge to owe ——— (*the plaintiff in the action*) the sum of £—— (*double the sum recovered*) upon condition that ——— (*the defendant in the action*) prosecute his writ of error with effect, and if judgment be affirmed, shall satisfy and pay the debt, damages, and costs recovered, together with such costs as shall be awarded by occasion of the delay of execution, or else you will do it for him.

And see title FALSE JUDGMENT; *Writ of False Judgment.*

Escape generally.

ESCAPE.

This title admits of being treated less on practical points than on those which relate to pleading; but the practitioner should be apprized, generally, of what constitutes the right of his client to render the sheriff or other officer liable for the escape of the debtor; and enough therefore of the later decisions on this question, will be inserted in order to facilitate the knowledge of what does and what does not constitute an escape, for which action will lie.

Escape on execution, &c. what shall be by statute.

By stat. 8 & 9 W. III. c. 27. s. 1. prisoners upon contempt or mesne process, or in execution, committed to the custody of the marshal of K. B. or warden of the Fleet, shall be detained within the said prisons, or the rules thereof, until discharged by due course of law; and if the marshal, or warden, or keeper of any prison shall suffer any prisoner committed to their custody, either on mesne process or in execution, or to go or be at large out of the rules of the prison, (except by virtue of some writ of *habeas corpus*, or rule of court, to be granted only upon motion made or petition sued in open court.)

By s. 8. if the keeper of any prison, after one day's notice in writing, refuse to shew any prisoner committed in execution to the creditor or his attorney, such refusal shall be deemed an escape.

Escape upon mesne process, what shall be.

A sheriff may render himself liable to an action for the escape of a person in custody on mesne process or in execution; e.g. it is an escape where not having taken a bail bond, nor put in bail before the expiration of four days after the return of the writ, the defendant is at large. See *Burn v. Sheriff of Middlesex*, 2 *Marsh.*

261. 6 *Taunt.* 554. S. C.; and it may be mentioned incidentally, that he cannot recover the money of the debtor whom he has permitted to escape. *Pitcher v. Bailey*, 8 *East*, 171. The principle upon which this case and that of *Cordron v. Lord Massarene*, *Peake Ni. Pri. Cas.* 144, were decided, was this, viz. that out of a breach of duty, a cause of action cannot be derived. And sheriff cannot recover for voluntary escape.

The sheriff having, within a liberty where particular officers had the exclusive privilege of executing all process, arrested a defendant upon a *ca. sa.* in which there was not any *non omittas* clause, suffered him to go at large before his removal from the liberty: held, that he was liable in an action for an escape. *Piggott v. Wilkes*, 3 *B. & A.* 502.

Where the sheriff had taken the defendants on a *ca. sa.* erroneously issued on judgment on a bail recognizance, and they had paid him the amount of the judgment and costs, whereon he had discharged them, and receiving notice to retain it, refused to pay it over to the plaintiff: held, 1st, that escape would lie; but 2d, the court relieved him from the escape, leaving him liable on the count for money had and received, that the plaintiff might litigate with him the right of the party giving the notice to retain. *Wooder v. Moxon*, 6 *T. R.* 490.

But taking a prisoner in execution in a lock-up house in his bailiwick is no escape. *Houlditch and Another v. Birch and Another*, 4 *Taunt.* 608.

And the court will not stay proceedings in an action for the escape of a certificated bankrupt taken in execution, released by the sheriff upon production of his certificate. *Sherwood, gent. one, &c. v. Benson*, 4 *Taunt.* 631.

If the defendant escapes from custody, or mesne process, the sheriff is liable in an action for an escape; but the mode of ruling the sheriff to return the writ, and bring in the body, is often the more summary proceeding against him, and therefore an action for the escape from custody on mesne process is not commonly resorted to, where there is time to rule the sheriff.

The action may be defeated by an allowance of bail above served subsequently to its commencement, being produced on the trial, and the court will not inquire the precise day of the bail being put in: it will be sufficient if bail appear in the cause. See *Pariente v. Plumbtree*, 2 *B. & P.* 35. *Allingham v. Flower*, *id.* 246. But it is necessary that the bail should be put in the same term that the writ is returnable. *Moses and Another v. Norris*, 4 *M. & S.* 397. It is of great moment therefore that justification of bail should be opposed; and it seems the court would not allow a justification under special circumstances; for if no bail bond be taken, or if an undertaking to the sheriff, to put in bail, be given other than a bail bond, the bail would not be allowed to justify, and the action will not be defeated. *Fuller v. Prest*, 1 *T. R.* 109; see *Burn v. Sheriff of Middlesex*, 2 *Marsh.* 261; also *Atkinson v. Matteson*, 2 *T. R.* 172; and in a case cited 1 *Tidd*, 259, where bail had been permitted to justify without opposition, the court set aside the rule for the allowance of the bail on payment of the costs of the justification. *Bosanquet v. Simpson*, *E. 42 G. III.* And in order to admit proceedings in action for Where putting in bail may defeat it.
But oppose justification.

escape, C. P. set aside a rule for allowance of bail, where no bail bond had been taken. *How v. Lacy*, 1 *Tunst.* 119. And the old sheriff is liable to this action; for where, after arresting the defendant, the old sheriff suffered him to escape, and went out of office before the return-day, he alone was held answerable for an escape, for it was ruled that the same sheriff by whom any writ directed and delivered to him is executed while in office, ought to make his return to the same, and hand such writ and return over to the new sheriff, who comes into office before the return day, and such new sheriff will return the writ with the old sheriff's return thereon. *The King v. The late Sheriff of Middlesex*, 4 *East*, 604.

If a sheriff having arrested a defendant on meane process keep him in his custody after the return of the writ, and then carry him to prison, he is not liable to this action if the jury find that the plaintiff has not been delayed or prejudiced in his suit. *Planck v. Anderson*, 5 *T. R.* 37.

The sheriff having a writ against G. B. arrested M. B. who was the real debtor, and at the time of contracting the debt had represented himself as G. B.: held, that the sheriff having been informed of these circumstances, while he had the real debtor in his custody, was not bound to detain him, and therefore that an action would not lie against him for an escape. *Morgan v. Bridges*, 1 *B. & A.* 647.

So an attachment for non-payment of money is in the nature of meane process, and where the party had been taken and permitted to go at large, and returned again into custody, and continued in custody at the return of the writ, it was held that the sheriff was not liable to an action for an escape. *Lewis v. Morland*, 2 *B. & A.* 56.

An action lies upon stat. 44 *G. III.* c. 23. s. 4. by a common informer suing for himself and the king to recover a penalty against the sheriff, for the misconduct of his bailiff in wilfully suffering a seaman to go at large who had been taken out of the king's service by arrest on civil process, on which he afterwards was bailed, instead of delivering him over to the charge of a proper naval officer; the statute which speaks of sheriffs, gaolers, or other officers in whose custody they may be, arresting, apprehending, or taking in execution such seamen, and who are made liable for their escape, meaning by "other officers," such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention, or discharge; and not the inferior officers of the sheriff. And the sheriff may be charged in such action for wrongfully and wilfully permitting the escape. *Sturmy, q. t. v. Smith*, 11 *East*, 25.

It will have appeared above that the sheriff is not liable to this action, if the defendant be forthcoming at the return of the writ, nor if the sheriff shall have taken a bail bond. See also *Barton v. Aldeworth*, *Cro. Eliz.* 624. 2 *Salk.* 314.

In an action against the sheriff for the escape of a prisoner on meane process, the plaintiff was nonsuited because he could not prove any debt against the prisoner, who escaped. *Alexander v. Macaulay*, 4 *T. R.* 611.

Stat. 44 *G. III.*
c. 23. s. 4; where
common informer
may sue upon
this statute.

But it seems that in order to render the marshal liable for an escape, the court of K. B. will not compel him to affile of record a writ of *habeas corpus cum causa*, by virtue of which a person is committed to his custody in execution. *Cooper v. Jones*, 2 M. & S. 102.

If he hath taken bail, he must plead the statute (*i. e.* 23 H. VI. c. 9.) to this action. 2 Saund. 154, 5; he cannot demur to the declaration, *ib.*; or move in arrest of judgment, 1 Tidd, 528.

And a voluntary return of a prisoner, after an escape before action brought, is equal to a retaking on a fresh pursuit; but it must be pleaded. *Bonafous v. Walker*, 2 T. R. 126.

The venue in this action cannot be changed. 2 Salk. 678.

Where the defendant is in custody in execution, and escapes or is rescued, the sheriff, or party in whose custody he was, is liable: and an action of debt will lie against a gaoler for the escape of a prisoner in execution, though the escape were without the knowledge or fault of the gaoler, who, in such case, can avail himself of nothing but the act of God or the king's enemies as an excuse. *Alsept v. Eyles*, 2 H. Bl. 108. And mere mistake as to the title of the cause may expose the marshal to this action. B. being in custody at the suit of A. in a joint action against B. and C., B. justifies bail in an action entitled by mistake "A. against B." only; and a rule so entitled is served on the marshal of K. B. who thereupon discharges B. out of custody, he not being charged in custody in any more than one action at the suit of A.; held, that the marshal was liable in an action for an escape. *White v. Jones*, 5 East, 292.

What the sheriff must plead.
Further of what shall be escape or not.

The plaintiff may have a new execution against the defendant if he had been in the custody of the sheriff; or an escape warrant in case of custody of the marshal of the King's Bench, or of the warden of the Fleet prison.

See title ESCAPE WARRANT; and the party is not compellable to resort to these officers. 2 Bac. Abr. tit. *Escape*; but if an action for an escape be brought, the retaking cannot be given in evidence, but must be pleaded. 8 & 9 W. III. c. 27. s. 6. which enacts, that no retaking or fresh pursuit shall be given in evidence on the trial of any issue in any action of escape against the marshal, unless the same shall be specially pleaded; nor shall any special plea be received or allowed, unless oath be first made in writing by the defendant, and filed in the proper office, that the prisoner for whose escape such action is brought, escaped without his consent, privity, or knowledge.

An escape from the rules of the King's Bench prison without the marshal's knowledge is not a voluntary escape. *Bonafous v. Walker*, 2 T. R. 126.

If a prisoner in execution be permitted to go about with a follower of the sheriff's officer, before he is taken to prison, it is an escape. *Benton v. Sutton*, 1 B. & P. 24; so also if he went about accompanied by the officer himself, *Qy. ib.*

So also it is an escape if a bailiff of a liberty remove a prisoner in execution to the county gaol situate out of the liberty, and there deliver him into the custody of the sheriff. *Boothman v. Earl of Surrey*, 2 T. R. 5.

So also where the sheriff receives the damages and costs before the return day of the *capias ad satisfaciendum*, and thereupon liberates the prisoner before he has paid over the levy money to the plaintiff, the sheriff is answerable for an escape, and his return under the common rule of *cepi corpus*, and that he had detained the prisoner until he had satisfied *him* (the sheriff) the levy money indorsed on the writ, which he had ready as commanded, &c. is of no avail. *Slackford v. Sheriff of Surrey*, 14 *East*, 468.

And in debt against the sheriff or gaoler for an escape of a prisoner in execution, the jury cannot give a less sum than the creditor would have recovered against the prisoner, namely, the sum indorsed on the writ, and the legal fees of execution. *Bonafous v. Walker*, 2 *T. R.* 126. But if the action be in case for escape upon mesne process, the jury have discretion, under the circumstances, to give less, and indeed only nominal damages, when the plaintiff would in all probability have recovered little or nothing had the defendant remained in custody.

What.

ESCAPE-WARRANT. This warrant is given by stat. 1 *Anne*, c. 6. st. 2. by which, if any person charged in custody of the marshal of the Queen's Bench, or in the Fleet, either in execution, or upon mesne process, or for contempt, and such person shall, before payment or satisfaction of the plaintiff or creditor, or before he shall have cleared himself of the contempt charged with at the time of his commitment, or being in execution as aforesaid, shall make any escape from such custody, or shall go at large, upon oath thereof by one or more credible persons, before any one of the judges of that court where such action was entered, or judgment or execution were obtained, or where the party was so charged or committed as aforesaid, such judge may grant one or more warrant or warrants, under his hand and seal, (to recite as specified in the act) to be in force through all England and Wales, and the town of Berwick upon Tweed, and to be directed to all sheriffs, &c. commanding them to seize and retake such person so escaped or going at large, who is to be committed to the county gaol where retaken, there to remain until payment or satisfaction to the plaintiff or creditor in such action or execution named, or until the judgment shall be reversed or discharged in due course of law, or until judgment shall be given for the person committed, or until the said contempt, for which such person shall be committed, shall be cleared, except such person be charged with treason, or felony, &c. on behalf of the Queen.

By s. 2. the sheriff is to be answerable for escape of the person so retaken, from his custody, &c.

ESSOIN, or Essoign. *Essoign Day of the Term.*

What.

This is the first return in every term. It is a general one, and thereon the court sits, or is presumed to sit, to take *essoins*, or excuses for such as do not appear according to the summons of the writ, though the court does not actually sit till the *quarto die post*, which is the first day of full term.

When deemed the first day of term.

The *essoign day*, although the court do not sit till the *quarto die post*, which, as above-mentioned, is the first day of full term, is

for many purposes considered as the first day of term; as if a writ be pleaded as sued out on a day between the *essoin day* and the first day of the term, and there be a special demurrer for that cause, the objection will not prevail. *Belk v. Broadbent*, 3 T. R. 183. 5.

There cannot be an *essoin* in a personal action. *Rooke v. The Earl of Leicester*, 2 T. R. 16.

Nor where a corporation are defendants. *Argent v. The Dean and Chapter of St. Paul's*, *ib. n.* cited fully 16 *East*, 8. n.

And if on the return of a writ in personal action, the defendant cast an *essoin*, which is not adjourned to a particular day, and it is not quashed, and the plaintiff deliver his declaration on the first day of the following term, the defendant is not entitled to an imparlance. *Rooke v. The Earl of Leicester*, 2 T. R. 16.

ESTOPPEL.

A bar to a right of action arising from a man's own act. *Co. What. Lit.* 352; but this may relate only to where a defendant may plead the plaintiff's own act in bar; but the plaintiff may also reply *estoppel* to matter pleaded by the defendant; and therefore it may perhaps be said, that *estoppel* is not only a bar to a right of action by the plaintiff, but that the defendant may also be concluded by matter of *estoppel* arising from his own act.

What is and what is not matter of *estoppel* may hardly be deemed a practical question. The principle of what that is which constitutes *estoppel* may be seen in *James's Case*, *Moor*, 181, where it was held that the taking of a lease by indenture of a man's own land, whereof he is seised in fee, is an *estoppel* to claim the fee during the term, and by a modern case it was recognized that, in general, the grantor is *estopped* by his deed to say he had no interest. *Fairtitle, d. Mytton v. Gilbert*, 2 T. R. 171.

And also in a modern case, held, that in an action by the assignee of the patentee against the patentee himself, he is *estopped* from shewing that it was not a new invention against his own deed. *Oldham v. Langmead*, cited 3 T. R. 439, 441; and what, indeed, may be referable to a practical decision, if a verdict be found on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of *estoppel* in another action between the same parties, or their privies, in respect of the same fact or title. *Outram v. Morewood, Clerk*, 3 *East*, 346.

So where a man is arrested by a wrong name, and he give a bail bond by his right name, he shall be *estopped* from pleading a misnomer. See titles ARREST. BAIL BOND. MISNOMER.

EVICTION.

A recovery of lands, &c. by form of law; but in practical language the term *eviction* is generally applied to where a party having obtained possession of lands, &c. by execution, is turned out or evicted from them by a title superior to that of the defendant's, and for this *eviction* his execution being defeated, the law has provided the plaintiff a remedy. *What.*

On this head it may be sufficient further to note, that where lands taken on extent (or *elegit*) are evicted or recovered by a better title, the plaintiff shall have a new execution. *Fulwood's Case*,

4 Rep. 66; and that if on an exchange of lands, either party is evicted of the lands given in exchange, he may enter on his own lands. *Bustard's Case*, 4 Rep. 121.

There are many points as to the mode of proceeding in case of *eviction*; whether under stat. *Westm. 2.* or by *sci. fa.* under stat. 32 H. VIII. c. 5. or when the lands were extended under a recognizance in the nature of a statute staple under stat. 8 G. I. c. 25. s. 4.

EVIDENCE.

Distinction between evidence and testimony.

What is proof of a fact is evidence of that fact; but it is not equally true that what is evidence of a fact, in one meaning of the word evidence, is also proof of that fact; for evidence may be given of the existence of such fact, which may fall short of proving that fact to have existed. It were therefore to be wished that the real import of the word "evidence" were more accurately defined than at present it appears to be; it is too often confounded with the words "testimony" and "proof;" and yet it does not, like some other important words in every language, seem to baffle an attempt to limit it to an obvious and definite meaning.

Of evidence.

Evidence may be said to be the legal means by which the existence or non-existence of a fact is finally established in human belief; and with the sense so limited it may be here inquired what, specifically, those legal means are. In estimating the probability or improbability of an alleged fact; the practitioner, whose duty it must necessarily be to attempt that estimate previously to the institution of a legal remedy, will not be the less successful in such attempt from having already attained a comprehensive, yet discriminating knowledge of what does and what does not constitute legal evidence. This observation may derive force from the consideration that a vast proportion of suits have wholly failed from a total want of investigation previously to their commencement, not only of the nature of the evidence, but of the requisite degree of proof which the law requires to be adduced at the time of trial.

Of testimony.

Testimony may be said to be any allegation of matter of fact, the existence of which may remain to be weighed, previously to its being finally received as proof, conclusive of the matter in issue.

These observations would not have been hazarded, and hazarded they are, had it appeared that any practical work had sufficiently discriminated the words "testimony," "proof," and "evidence." Neither Mr. Peake, and a very valuable compilation the *Compendium of the Law of Evidence* is, or Mr. Phillips, the author of a work, perhaps the most perfect upon the subject, have not defined the meaning of the word; and L. C. B. Gilbert has left it in great doubt whether testimony be evidence, or whether evidence be testimony, or whether testimony be proof. Indeed this great law writer, as also others of dimmer light, seem to confound three words differing more than in shades from each other.

The *Law Dictionary*, title *Evidence*, a work of unquestionable value, defines evidence to be proof by testimony of witnesses on oath, or by writings or record; but in this definition we again perceive that evidence, proof, testimony, and oath, are confounded, if not jumbled together: whereas not any things may be more

contrasted with each other; nor is the oath of the witness necessary to make his testimony valid.

I shall however very briefly advert to what the legal means are by which human belief in the existence or non-existence of a fact is to be attempted to be established.

Forensic judgments are founded upon records and other written documents under certain circumstances; and also upon the oral testimony of witnesses privately or publicly delivered; yet all these are only so far proof as they influence human belief ultimately to adopt them as proof; and human belief, except as to physical impressions, is very uncertain and fallible. Evidence cannot be identified with proof; for in judicial matters it would be folly to admit that to be the proof or demonstration of a truth, which, however, is only testimony or evidence which may or may not be adopted according as the education, the habits, the modes of thinking, nay, the caprice of the human mind, may influence or pervert its decision: until, therefore, the ultimate sanction of the mind shall be pronounced concerning it, even the most sacred, solemn, and indisputable testimony or evidence shall not be deemed proof; it remains evidence or testimony merely. The sun shining at the moment when it might be of consequence to determine whether it shone or not, requires no other proof but the exercise of the visual faculty common to mankind; but were it to be alleged that, on a particular and distant day, at a particular place and a precise time, the sun did not shine, this allegation would no more be proof of the past than of the future; but it would be evidence or testimony that might or possibly might not be true: and it is this possibility which deprives evidence or testimony of a claim to be synonymous with proof.

But in a long course of time the belief of mankind gradually becomes as much decided upon matters in their nature capable of diversity of representation, as it is upon the physical appearances of the world; and that which in one century would have been heard with doubtful caution, and unwillingly adopted in the next, becomes in another an established fact to which mankind, guided more perhaps by expediency than by experience, at length assigns an authority tantamount to physical.

The facts composing every individual case form but an epitome of larger and more comprehensive views of the nature of evidence, and that practitioner will act most conduively to his client's success, who, in advising upon his pretensions, shall consider, that the facts and circumstances of the case submitted to him, however they may be confirmed by the most apparently unobjectionable testimony, never can safely be estimated as other than evidence liable to be opposed by evidence; and that in prudential foresight, they ought most rarely to be deemed and accepted as proof of the fact assumed to be true.

The practitioner should advert to the possibility that the proof, that is, the ultimate result of evidence or testimony, may be in thorough discordance with that evidence or testimony he may be instructed to offer for the consideration of the court and jury.

Practical limitation of the word "evidence."

In the more strict, and as I conceive the useful and practical application of the word, "evidence," that is, legal proof, cannot be adduced for the existence and against the existence of one and the same fact; but evidence, taken in the same sense as testimony, may: yet we often hear of opposite parties adducing evidence in relation to the existence and non-existence of the same facts; a thing impossible in the terms of expressing the very conception of its possibility.

A more useful, and certainly a more practical view of evidence may now be taken.

As to written matter proposed as evidence.

Records.

RECORDS.

The solemnity with which written documents originating with the legislature or with the judicial functions recognized by the state, and affecting the public at large, or individuals so far privately, are recorded or registered, hath very properly given rise to a rule of law, that such records or registers are of themselves evidence; that is, that no averment can be judicially received contravening their truth, and that they prove themselves; public convenience is concerned to admit this rule of law; and acts of parliament or of the state affecting the public generally, and some private and local acts of parliament though known to be private acts, *Bull. N. P. 225*, become evidence by the mere production of the statute book, or of a printed copy of such act of the state so affecting the public, or of a private act of parliament.

In general, however, private acts of parliament must be proved by a witness producing a copy thereof, examined or compared by himself with the roll in parliament.

Those judicial records which only affect individuals, and are therefore private when under seal, must be proved or rendered evidence by being exemplified under the broad seal, and then they may not be questioned; or under the seal of the courts, and these last are of higher authority than sworn copies; or they may be proved by the production of a copy on stamp, by an oath that the copy is true and that the deponent hath compared and examined the same with the original.

In a late case it has been decided that to prove a copy of a record, it is sufficient to prove that the paper agrees with what the officer of the court read as the contents of the record; it is not necessary for the persons examining to exchange papers and read them alternately as in another case. *Rolf v. Dart*, 2 *Taunt.* 52.

As to parties in the cause being witnesses.

It seems that if both plaintiff and defendant are willing, either of them is a competent witness on oath. *Norden v. Williamson*, 1 *Taunt.* 378. This case was so determined as to the plaintiff, and that although he came to defeat the claim of another plaintiff suing jointly with himself.

And it may be mentioned, that what a dead witness has sworn upon a former trial between the same parties, is evidence in the cause, and may either be read from the judge's notes, or proved upon oath by the notes or recollection of any person who heard it. *Mayor of Doncaster v. Day*, 3 *Taunt.* 262.

But in order to facilitate reference as to what is proof, and what is the mode of proof, of acts, deeds, instruments, &c. in the more obvious practical cases, an alphabetical table, the utility of which will, it is presumed, be seen at first sight, will be subjoined. It cannot otherwise be expected, but that in this table much that it is important should be known, must be omitted; but then it may be remembered that much useful information is inserted, much derived from the best authorities condensed; and if an authority for every point inserted, be not cited, yet no one is inserted without authority.

Reference to a table subjoined.

An observation may however be premised as a general rule in relation to evidence, *viz.* the best evidence, the nature of the fact to be proved is susceptible of being proved by, must be produced; a secondary kind of proof, where it appears a primary or better one could have been had, will be rejected.

ALPHABETICAL TABLE OF EVIDENCE,

As to the mode of proving certain Documents, &c.

ACQUITTAL, proved in the same manner as **INDICTMENT**, which see, in this table, *post.* And see *Jordan v. Lewis*, 14 *East*, 305. Heads of proofs.

ACT OF PARLIAMENT, public; proved by producing the statute book, or a printed copy.

ACT OF PARLIAMENT, private; proved by a witness producing a copy, examined and compared by himself with the parliament roll; but if it contain a clause declaratory of its being to be taken as a public act, it is proved by producing the statute book, or printed copy.

ACTS OF STATE, proved, by production of copy printed by the king's printer.

ADDRESS TO THE CROWN; proved by producing the royal gazette.

ADMINISTRATION. Letters of Administration.

An examined copy of the act book in the registry of the Prerogative Court of Canterbury, stating that administration was granted to the defendant, is sufficient proof of her being administratrix, without giving her notice to produce the letters of administration. *Davis, treasurer, &c. v. Lady Eliz. Williams, administratrix, &c.* 13 *East*, 232. See **PROBATE OF WILL**. See also **BOOKS**, in this table.

ADMIRALTY. Proceedings in a court of admiralty. Proved by the same means as answer in Chancery.

AFFIDAVIT. If made in the course of a cause. See **CHANCERY**, *proceedings in Chancery or Equity*, in this table.

AFFIDAVIT. An affidavit was made in the course of a legal proceeding proved by producing the original, and that it was sworn; this is done by proving the hand-writing or the signature of the person before whom it was sworn, and this, with proof of the hand-writing of the party making the

Heda of proofs.

affidavit, will be evidence of the oath having been duly administered.

AGREEMENT. No parol evidence can be admitted to explain an agreement where there is no latent ambiguity. *Coker v. Guy*, 2 B. & P. 565.

ANCIENT DEMESNE. Proved by Domesday book. So high is its authority, that the court directs an inspection. *Gilb. Ev.* 78.

ANSWER IN CHANCERY, or Equity. See **CHANCERY**, proceedings in *Chancery or Equity*, in this table.

ARTICLES OF WAR. Proved by producing a copy, printed by the king's printer.

ATTORNEY'S BILL. In an action on an attorney's bill, the *nisi prius* roll is good *prima facie* evidence that the action was not commenced till the expiration of a month after the delivery of the bill. *Webb v. Pritchett*, 1 B. & P. 263.

And delivery is conclusive evidence on a taxation against an increased charge, and strong presumptive evidence against additional items. *Loveridge v. Botham*, *Id.* 49.

BANK BOOKS. See **BOOKS**, in this table.

BANKRUPTCY. In actions by and against the assignees. The commission and the proceedings are evidence of the petitioning creditor's debt, and of the trading and bankruptcy, unless due notice be given of an intention to dispute such matters. See stat. 49 G. III. c. 121. s. 10. And they are proved by the production from the custody of the solicitor; or, by proving the hand-writing of one of the commissioners before whom they were taken. *Collinson and Another, Assignees, &c. v. Hillear*, 1 *Campb.* 30.

But by stat. 4 G. IV. c. 98. ss. 86, 87, in any action, &c. no proof shall be required at the trial, of the petitioning creditor's debt, or of the trading or act of bankruptcy, unless the other party in such action shall, if defendant at or before pleading, and if plaintiff before issue joined give notice in writing to such assignee, &c. that he intends to dispute some or one of such matters. And where such notice shall have been given, and on proof or admission of the matter disputed, the judge may, if *he think fit*, grant a certificate of such proof or admission, and such assignee, &c. shall be entitled to costs to be taxed by the proper officer, occasioned by the notice, &c. s. 86.

And a similar clause, viz. s. 87, comprehends suits in equity.

In an action by the assignees of a bankrupt, who had obtained his certificate, and released the surplus of his estate, the bankrupt is a competent witness to prove the hand-writing of the commissioners, in order to identify the proceedings taken under the commission against him. *Morgan, Assignee, &c. v. Pryor*, 1 B. & C. 14.

And see head DEPOSITIONS. Depositions in bankruptcy, Heads of proofs, in this table.

Also ss. 90, 91, 92, 93, of stat. 5 G. IV. c. 98.

BAPTISM. See PARISH REGISTER, in this table, *post*.

BARGAIN AND SALE INROLLED. See INROLMENT, in this table, *post*.

BILL IN CHANCERY. A bill in Chancery is no evidence of the facts contained in it, not even of those on which the prayer of relief is founded. *Doe, d. Bowerman v. Sybourn*, 7 T. R. 2. See CHANCERY, *proceedings in Chancery*, in this table.

BILL OF EXCHANGE; PROMISSORY NOTE. In action by the payee against the acceptor of the bill of exchange, or by the payee against the maker of a note, proof that the name subscribed to the acceptance or note is the hand-writing of the defendant, or of some person specially authorized by him is sufficient; or

If in the case of a bill of exchange, the acceptance were verbal, proof of the circumstances under which it was made must be adduced.

If the bill so verbally accepted, were never shown to the acceptor, the hand-writing of the drawer must be proved; but a written acceptance renders this unnecessary. *Wilkinson v. Lutwidge*, 1 Str. 648.

If the action be brought by an indorsee against the acceptor, it is also necessary to prove the hand-writing of the first indorser. *Smith v. Chester*, 1 T. R. 654; and if the bill or note shall have been stolen, it will be necessary for the plaintiff to shew that it was taken in the ordinary course of business, and that he is therefore an innocent holder. *Peacock v. Rhodes*, Doug. 636.

If the action be against the indorser, his indorsement must be proved, and also that the bill was presented for payment or acceptance, and refused, and that due notice was given of that fact. Such notice may be proved by first giving notice to the defendant to produce the letter containing such notice. *Shaw v. Markham*, *Peake's Ni. Pri. Ca.* 165, and then proving that such letter was put in the post-office, and directed to him, *Saunderson v. Judge*, 2 H. Bla. 509. See also *Parker v. Gordon*, 7 East, 385. The hand-writing of the drawer and all previous indorsers need not be proved. *Critchlow v. Parry*, 2 Campb. 182.

It has been held, that a person whose name is forged as the drawer of a bill, is not a competent witness to disprove an indorsement on the bill made by the party who forged it, respecting the payment of interest upon that bill. *Rex v. Crocker*, 2 N. R. 87.

In action by the indorsee against the drawer, the like proof must be given, and also of his hand-writing. *Peak. Ev.* 236. So also the indorsement of the payee must be proved. *Duncan v. Scott*, 1 Campb. 101.

Heads of proofs.

In the case of foreign bills, &c. the non-payment, &c. by the drawee, may be proved by the mere production of the protest, if made abroad. *Anon.* 12 *Mod.* 345; but if the action be against the drawer, and the protest be for non-acceptance here, the protest, if made here, must be duly proved. *Gale v. Walsh*, 5 *T. R.* 269. See **PROTEST**, in this table. The case reported does not state the facts clearly, so as to avoid clashing with the decision in 12 *Mod.*

In action against the drawer, the proof of the notice will in certain cases be dispensed with, as where the acceptor had no effects. *Bickerdike v. Bollman*, 1 *T. R.* 405; but in an action against the indorser it will not. *Wilkes v. Jacks*, *Peake's Ni. Pri.* 202.

There are several later decisions, as to whether it be or not necessary to prove notice to some, or one, of the parties, to a bill of exchange; but these are questions which may well give place to others of a more practical description.

In an action by the drawer against the acceptor for not paying the bill, the drawer proved the acceptance, and that the plaintiff had paid the payee the money and charges, at *nisi prius*, it must also be proved that the bill was presented for payment, dishonoured, and returned to the drawer. See *Simmonds v. Parminter*, 1 *Wils.* 185.

BIRTH. See **PARISH REGISTER**, in this table.

BOND. See **DEED**, in this table.

— See, in this Dictionary, title **EXECUTOR AND ADMINISTRATOR**, *post*.

BOOKS. Books of the Bank. Entries therein. Proved by a person producing a copy or extract from such books, and swearing to have compared and examined such copy with the original.

— Books of a Corporation. Entries therein. Proved in like manner; but the originals must be produced where a particular ground is laid before the court; as where an affidavit was made of *rasure*. *Brocas v. The Mayor, &c. of London*, 1 *Str.* 307, and the cases there cited. See also *Rex v. Gwyn*, 1 *Str.* 401, and the notes.

— Books of a deceased collector of taxes, where evidence against his surety. See *Goss v. Watlington*, 6 *J. B. Moort*, 355.

— Books of the Fleet. Not in any case received as evidence of a marriage. See, however, **MARRIAGE**, in this table.

— Log-book of a man of war. The mere production is sufficient to know when a ship became part of her convoy. *D'Israeli v. Jowett*, 1 *Esp. Cas.* 427.

— Book or register of the Navy-office. This, with proof of the method there used to return all persons dead, with the mark Dd. is sufficient evidence of death. *Bull, N. P.* 249.

BOOKS. Book of a public prison. Admissible to prove the time of prisoner's discharge. *Rex v. Arkles*, *Lea. Ca.* 435; and of his commitment, but not to prove the cause of his commitment. *Salte v. Thomas*, 3 *B. & P.* 188. Heads of proofs.

— Book kept by a steward since deceased, or that of other private person, wherein are contained entries respecting the rights in question, these have been admitted as evidence to prove such rights. But the party making the entry must not be interested. *Outram v. Morewood*, 5 *T. R.* 121. See also *Higham v. Ridgway*, 10 *East*, 109, and *Doe, d. Webber v. Lord George Thynne*, *Ib.* 206.

Entries in a steward's book above thirty years old, and coming from the proper custody, are admissible in evidence, without proving the hand-writing of the steward. *Semble*, that the rule extends to all written documents coming from the proper custody. *Wynne, bart. v. Tyrwhitt*, 5 *M. & S.* 376.

— Books of the Secretary of State are the next best evidence in case a license to trade is lost. *Rhind v. Wilkinson*, 2 *Taunt.* 237.

— Book of the Sheriff's Court, London. Minute or memorandum thereof, where evidence of a suit's being withdrawn. See *Arundell v. White*, 14 *East*, 216.

— Tradesmen's books. The 7 *Jac.* l. c. 12, enacts, that the shop book of a tradesman shall not be evidence after a year. However it is not evidence of itself within the year, without some circumstances to make it so. As if it be proved that the servant who wrote it is dead, and that it is his hand-writing, and that he was accustomed to make the entries. *Bull. N. P.* 282. But there was a nice and not very obvious distinction taken between two cases. The first where in order to prove a delivery the evidence was that the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer delivered out which he set down in a book, to which the draymen set their hands, and that the drayman was dead, and this is his hand; it was holden to be good evidence of a delivery; but where the plaintiff, to prove delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles, as wine delivered to the defendant, and a witness was ready to prove his hand, Lord Chief Justice Raymond would not allow it, saying it differed from Lord Torrington's case, because there the witness saw the draymen sign the book every night. And generally, as observed by Mr. Peake, the law receives the memorandum in writing, made at the time by a person since deceased, in the ordinary way of his business, and which is corroborated by other circumstances, as evidence of the fact it records. *Ev.* 14, 15, and the notes.

BULL. Papal or Pope's Bull, proved by an exemplification, 53, 54, under the bishop's seal.

EVIDENCE; ALPHABETICAL TABLE.

BURIAL. See **PARISH REGISTER**, in this table.

CERTIFICATE. Bankrupt's certificate. Proved by production. The court will notice the great seal. And see stat. 5 G. IV. c. 98. ss. 91, 92.

CHANCERY. Proceedings in Chancery or Equity. See **BILL IN CHANCERY**, in this table, *ante*.

Proved by a person producing an office copy, and swearing that he has examined and compared the same with the original. And this without producing the original. See 2 *D. & R.* 347. And see head **CO-PARTNERSHIP**, in this table. But it should be observed, that in order to make an answer, &c. evidence, a foundation must be first laid by proof of all the former stages; as the bill to make way for the answer; the bill and the answer, or that the defendant was in contempt, as the foundation for the depositions, &c. *Peak. Ev.* 68, citing *Gilb. Ev.* 56. 65.

COMMISSIONERS OF BANKRUPT. See heads **BANKRUPTCY. DEPOSITIONS.** Depositions in bankruptcy, in this table.

COMMONS. Journals of the House of Commons. Entries therein.

Proved by a person producing a copy (*unstamped*) and swearing to its truth, and that he has examined and compared it with the original.

COMPARISON OF HANDS. See **HAND-WRITING**, *post*, in this table.

CONSENT RULE. In certain cases it seems necessary that this should be proved; which is generally done by its being produced; but where the party obtaining it does not produce it, the plaintiff should be prepared with an office copy, examined with the original.

CONVICTION. Under what circumstances evidence for the justices. See *Gray v. Cookson*, 16 *East*, 13.

CO-PARTNERSHIP. In an action against three defendants as partners, the office copy of an answer to a bill in Chancery, filed by one against the others, is admissible evidence, without producing the original, in order to establish the partnership, and to prove the identity of the defendant, the clerk of their solicitor is a competent witness to that fact, though he know nothing of the defendants but from his intercourse with them professionally in the conduct of the suit in Chancery. *Studdy v. Sanders*, 2 *D. & R.* 347.

COPIES. See **OBSERVATIONS** as to records prefixed to this table. Also, as to office copies of what proceedings in bankruptcy, 5 G. IV. c. 98. s. 93.

COPYHOLD. Title to a copyhold, proved by the rolls of the manor, which shew a surrender to him, or to those under

whom he claims, and in general his own admittance. *Peak. Heads of proofs. Ev. 455. 460.*

See also as to what RIGHT OF COMMON, the parchment writings preserved among the muniments of a manor were held to be evidence of. *Chapman v. Cowlan, 13 East, 10.*

CORPORATION BOOKS. See **BOOKS, CORPORATION BOOKS.**

CORPORATORS. Where they may or not be witnesses. If interested they cannot. *Rex v. Mary Magd. Bermondsey, 3 East, 5*, but as mere corporators for a public charity they may. *Weller v. Governors of Found. Hosp. Peak. Ca. 153.*

COVENANT. See **DEED, post.**

COVERTURE. On a plea of coverture, the marriage, identity, and that her husband was living after the time the debt was contracted, must be proved. See **PARISH REGISTER.**

The plea of *non est factum*, is sufficient to avoid a deed given by a woman under coverture. *Bull. N. P. 172.*

COURT. Proceedings in a Court of Record. In general proved by a person producing a copy, and swearing that it is true, and that he has examined and compared the same with the original. See **FOREIGN COURT, post.**

— Not of record. The proceedings proved by the proper officer producing the books of such court, containing the original minutes as well those previous to the judgment, as the judgment itself.

COURT BARON. The rolls of the Court Baron. See **COURT.** Proceedings in a Court of record.

— **COUNTY.** See **COURT not of Record, ubi supra.**

CRIMINAL CONVERSATION. In this action must be proved, the marriage, according to the rites of the religion professed by the parties, identity of himself and wife; that they lived happily together; and the fact of the adultery.* See **MARRIAGE**, in this table.

CUSTOM. Proved by evidence of the declarations of deceased persons, who, from their situations, were likely to know the facts: also proof of the general reputation of the place most interested to preserve in memory the circumstances attending it. And in this case, any thing which shews such reputation is, on a question of this sort, received in evidence, though oftentimes wholly inadmissible in other cases. *Peak. Ev. 11.* See also *Morewood v. Wood, 14 East, 327.*

Twenty years usage uncontradicted, is cogent evidence for the jury to presume a custom immemorial, that the steward of

* It is a singular omission in a very able treatise on evidence, that in a section appropriated to this action, and amongst the other proofs enumerated

as being requisite to support it, no mention should be made of the necessity for proof of the adulterous act.

Heads of proofs.

a manor nominated the jury to serve on the court-leet at the election of a mayor of a borough. *The King v. Jolliffe*, 3 D. & R. 240.

CUSTOMARY OF A MANOR. As between the tenants, proved by the rolls of the manor, or even by an entry on an ancient roll of a finding by the homage what the customs were. *Roe, d. Beebee v. Parker*, 5 T. R. 26. See also as to REPUTATION, *Morewood v. Wood*, 14 East, 327.

DEATH. The fact of a tenant for life not having been seen or heard of for fourteen years by a person residing near the estate, although not a member of his family, is *prima facie* evidence of the death of the tenant for life. *Doe, d. Lloyd v. Deakin*, 4 B. & A. 433. See head PARISH REGISTER, in this table.

DECREE. See head CHANCERY. Proceedings in Chancery or Equity, in this table, *ante*.

DEED. The declaration in covenant on an indenture of apprenticeship averred, that the deed was in the possession of the defendant, who pleaded *non est factum*. At the trial the deed was proved to be in the hands of the defendant, who had received notice to produce it, the notice stating the name of the subscribing witnesses. On non-production of the deed, the plaintiff gave parol evidence of its contents, without calling the subscribing witness, who was in court: Held, that the parol evidence was well received. *Cooke v. Tanswell*, 8 Taunt. 450.

———. Proved by the production of the original, if it be in the party's possession, and by the further evidence mentioned below. If in the hands of the adverse party, a notice to produce it must be proved; if in those of a third person, he must be served with a subpoena, *duces tecum*. If not produced by either, parol evidence may be given of its contents, and it must be shewn that it was a genuine instrument. If produced, the testimony of the subscribing witness, if living and in a situation to be examined, to prove the execution, is indispensable. *Call v. Dunning*, 4 East, 53: and this rule is adhered to, even where, on other accounts, parol evidence of the contents of the deed shall be ruled to be admissible. *Keeling v. Ball*, *Peake's Evid. Append.* 37 G. III. And it has been held, that where a bond, having been executed by A. and attested by one witness, was carried into an adjoining room, and shewn to B. who was desired to attest it also, which he accordingly did in the presence of A. it was held that B. was a good witness to prove the execution. *Parke v. Mears*, 2 B. & P. 217. In debt on bond, if one of the attesting witnesses be dead, and the other beyond the process of the court, it is sufficient to prove the hand-writing of the witness that is dead. *Adam v. Kerr*, 1 B. & P. 360. And even a stronger case has been decided: if an attesting witness appears, upon search made at the Admiralty, to be serving in the navy, his absence is sufficiently accounted for, and

renders secondary evidence admissible. *Parker v. Hoskins*, 2 *Taunt.* 223. Where an instrument is produced at the trial by one of the parties, in consequence of notice from the other, which, when produced, appeared to have been executed by the party producing it and third persons, and to be attested by a subscribing witness, the production of it in that manner does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it. *Gordon v. Secretan*, 8 *East*, 548. The deed is not vacated by the want of subscribing witnesses. *Com. Dig. Fait*; and in this and in some other cases, as where the subscribing witness denies having seen the instrument executed, proof of the hand-writing of the party will be sufficient. Other evidence of execution is admissible. *Talbot v. Hodson*, 7 *Taunt.* 251. See *Grellier v. Neale*, *Peake's N. P. C.* 146; and *Cunliffe v. Sefton*, 2 *East*, 183.

Delivery of the deed, where not necessary to be proved. See *Peake's Evid.* 101, 2.

In case of the impossibility of procuring the testimony of a subscribing witness (except he be dead), and in certain cases of his incompetency, proof of the hand-writing of the party is usual, and in some cases necessary. *Wallis v. Delancy*, 7 *T. R.* 266, n. (c). And if an attesting witness has set out to leave the kingdom, his absence sufficiently accounted for, although at the time of trial his vessel shall have been in port, under stress of weather. *Ward v. Wells*, 1 *Taunt.* 461. See also *Crosby v. Percy*, *ib.* 364. But if above thirty years old, the deed is presumed valid, and may, in most cases, be read without further proof, but this presumption may be rebutted, as by a possession contrary to such deed being shewn.

DEMAND OF COPY OF WARRANT. See title CONSTABLE, *ante*.

DEPOSITIONS. See same title, *ante*.

Depositions in bankruptcy. By stat. 5 G. IV. c. 98. s. 88, if the bankrupt shall not, if within the United Kingdom, at the issuing of the commission, within two calendar months after the adjudication, or if out of the United Kingdom, within two months after his return, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners, of the petitioning creditors, debt, and of the trading and act of bankruptcy, shall be conclusive evidence in all actions at law or suits in equity brought by the assignees.

EQUITY. Proceedings in Equity. See head CHANCERY. Proceedings in Chancery or Equity, in this table.

EXAMINATION BY A MAGISTRATE. Proved by producing the same, and proving the hand-writing of the magistrate.

EVIDENCE; ALPHABETICAL TABLE.

Heads of proofs.

EXECUTOR. To prove defendant such. Where the defendants having had notice to produce the probate of the will of their testator, refused to produce the same; held, that an instrument produced by the officer of the ecclesiastical court, purporting to be the will of the defendant's testator, and indorsed by the officer as being the instrument whereof probate had been granted to the defendant, and that they had sworn to the value of the effects, was admissible to prove executorship. *Gorton and Another, Executors v. Dyson and Another, Executors*, 1 B. & B. 219.

EXEMPLIFICATIONS OF ENGLISH COURTS. These prove themselves. See **FOREIGN COURTS**, in this table, *post*.

FACULTIES. Office of Faculties. Entry in the book of this office; proved by producing this book. *Selby v. Harris*, 1 *Ld. Raym.* 745.

FINE. The fine having passed, is proved by producing the chirograph.

FOREIGN COURT. Sentence or judgment of a foreign court; proved, in general, by producing a copy under the seal of the court; but evidence should be adduced to shew the authenticity of that seal.

GAZETTE. Matters appearing in the gazette, proved by producing the same.

GRANT. Former grant by the crown, presumed by long and uninterrupted enjoyment. *The King v. The Bishop of Chester*, 1 *T. R.* 396. 399. 340. *n.* *Mayor of Kingstou-upon-Hull v. Horner*, 1 *Cowp.* 102.

HAND-WRITING. Proved by the best evidence the nature of the case will admit of. Therefore the belief of those who have been accustomed to see him write, or of those who have received letters from the party in a course of correspondence. *Gould v. Jones*, 1 *Bl. Rep.* 384. *Dr. Hensey's case*, 1 *Burr.* 642. Comparison of hands, unsupported by other circumstances, is universally rejected in evidence of hand-writing; but the hand-writing of persons long since dead, may be proved by comparison of hands. *Roe, d. Brune v. Rawlins*, 7 *East*, 279. 282.

HEARSAY EVIDENCE. In general not evidence, but where, as in relation to custom or right of way, and where it appears to be the best evidence the fact to be proved is susceptible of, hearsay evidence is allowed; and also where it is produced to shew that a witness was constant to himself, and whereby he was corroborated. *Luttrell v. Reynell*, 1 *Mod.* 284. See also *The King v. The Inhabitants of Erith*, 8 *T. R.* 615.

HISTORY. Matters of general history proved by a printed general history. 1 *Vent.* 149. *Lord Brounker v. Sir R. Atkyns*, *Skin.* 14. But the principle of these decisions is to be received with very great limitations on account of the falli-

bility of historians, the imperfection of their materials, and the wilfulness with which materials, even the most authentic, have been perverted. Should the question be again agitated, the decision would probably be less decisive as to thus allowing the occurrence of a particular fact to be so proved. At least the histories of contemporaneous writers would be admitted as evidence, to confirm or falsify the fact assumed. See the judicious observations of Mr. Peake, *Peake's Ev.* 82. Heads of proofs.

HOUSE OF LORDS. Journals of the House of Lords; entries therein, proved in like manner with those of the House of Commons. See **COMMONS**, *ante*.

INDICTMENT. Where, as in an action for a malicious prosecution, it may be necessary to prove an indictment, the same may be produced, or a true copy thereof, though there were no order of the court, or fiat of the attorney-general, allowing such production or copy. *Leggatt v. Tollervey*, 14 *East*, 302.

INFANCY. Proved by a person shewing copy of the registry of the birth of the infant, and swearing to the truth of the same, and also that he has examined and compared it with the original; his identity must be also proved.

INFIDEL. May be a witness. *Omichund v. Barker*, 1 *Wils.* 84.

INQUISITION in the nature of survey; proved by production. See **SURVEY**, *post*.

INROLMENT OF DEEDS. Proved by producing the indorsement on the deed by the proper officer. See *Kinnersley v. Orpe*, *Doug.* 56.

INSANITY. As to what shall constitute insanity, an epitome of the description of the present table may embrace but a general principle, and that principle seems to have been laid down by the late Lord Thurlow. In the *Attorney-General v. Parnther*, 3 *Bro. C. C.* 440, his Lordship is reported to have said, "That the evidence ought to go to the *state and habit* of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any *particular act*."

INSOLVENT DEBTOR, proof of discharge. A paper purporting to be a copy of the original discharge, and signed by the clerk of the proper officer of that court, with the impression of the seal affixed to it, is admissible in evidence to prove such discharge, without the production of the certificate thereof, or proof of its being an examined or attested copy. *Carpenter v. White*, 3 *J. B. Moore*, 231.

INTEREST. Interest of Witnesses. This is very much a question of *nisi prius*, depending on particular facts; but it may be observed generally, that in civil actions, parties having a present interest in the decision of the cause, cannot be admitted as evidence without consent; having a future or contingent interest, does not incapacitate a witness; but where no

Heds of proof.

other evidence can reasonably be expected, a party, though interested, will be admitted as a witness; as in an action on the statute of hue and cry, *Bull. N. P.* 289; or for the convenience of trade, as a porter, to prove delivery of goods; or a banker's clerk, to prove the receipt of money. *Ib.*

JOURNALS OF PARLIAMENT. See **COMMONS**, *ante*.

JUDGMENT. Proved by a person producing a copy on stamp (unstamped if it be a judgment of the House of Lords) and swearing that such copy is true, and that he examined and compared it with the original record; but the judgment book is no evidence of the judgment entered therein, though the record has not been made up, and though the person interested in proving the judgment be no party to the action. *Ayrey v. Davenport*, 2 *New R.* 474. An attested copy of the memorial of an assignment of a judgment, is evidence of the fact of the assignment. *Hobhouse v. Hamilton*, 1 *Sch. & Lef.* 207.

LETTER OF ATTORNEY executed in foreign parts. The notarial certificate and seal verified by the British consul, whose hand-writing is also verified by affidavit to the execution of a power of attorney executed in America to a person in London, to receive money here for the party abroad, is not evidence in a court of law of the due execution of the instrument, without the affidavit of the subscribing witness. *Ex parte Church and Others*, 1 *D. & R.* 324.

LETTERS OF ADMINISTRATION. See **PROBATE OF WILL**, *post*.

LETTERS PATENT. Proved by production. *Gilb. Evid.* 14.

LICENSE TO TRADE. See **BOOKS**, in this table, *ante*.

LUNACY. See **INSANITY**.

MAHOMEDAN. See **INFIDEL**.

MARRIAGE. See **COVERTURE**; see **PARISH REGISTER**.

NEWSPAPER. An affidavit made and signed by the printer and publisher and proprietor of a newspaper, as required by statute 38 *G. III.* c. 78; which affidavit contained the names of the parties, the place where the paper was printed, and the title of it; together with the production of a newspaper, tallying in every respect with the description of it in the affidavit, is not only evidence, by that act, of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be, and this upon the trial of an information for a libel contained in such newspaper. *The King v. Hart*, 10 *East*, 90. *Rex v. White*, 3 *Campb. N. P. R.* 99, 1050. And to render the certified copy of the affidavit made by the proprietor of a newspaper evidence under 38 *G. III.* c. 78, it

must either appear upon the jurat that the person before whom it was made, has authority to take it, or this fact must be proved *aliunde*. *Rex v. White*, 3 *Campb. N. P. C.* 99. Heads of proofs.

NOTICE OF ACTION, or any notice necessary to be proved. Proved by a person who kept the same, producing a copy signed by the same person who signed that delivered to the party, and swearing to the hand-writing, and to the due delivery of such copy. See **BILL OF EXCHANGE**, in this table, *ante*.

NUL TIEL RECORD. Where the record itself is put in issue by a plea of *nul tiel* record, in another court equal or inferior to that which gave the judgment, an exemplification under the great seal is the only evidence. *Peake's Evid.* who cites *Tidd's Prac.* 690, 3d edit.

PARDON. Proved by producing the same under the great seal. *Gully's Case*, *Leach Cro. Ca.* 115.

PARISH REGISTER. A particular entry therein may be proved by producing the original; a person competent should also prove its authenticity, or, as is most usual, a person may produce a copy of the entry on stamp, swear that it is a true copy, and that he has examined and compared the same with the original.

And see head **BOOKS**, in this table.

PAYMENT OF MONEY INTO COURT. Proved by the production of the rule for paying it in. See *Israel v. Benjamin*, 3 *Campb. N. P. R.* 40, 41.

PEDIGREE. Proved by hearsay evidence, that is evidence of the declaration of deceased persons, who from their situation, were likely to know the facts, and also the general reputation of the family most interested to preserve in memory the circumstances attending it. But in the proof of a pedigree, the dying declaration of A. as to the relationship of the lessor of the plaintiff to the person last seised, are not receivable in evidence. *Doe, d. Sutton v. Ridgway*, 4 *B. & A.* 53.

POPE'S LICENSE OR BULL. See **BULL**, in this table, *ante*.

POSSESSION. A grant of wreck from *H. II.* to the abbey of *C.* by *all their lands upon the sea*, confirmed by *insperimus* by *H. VIII.* and a subsequent grant by him of the island of *B.* and its shores, belonging to the late abbey of *C.* supported by evidence that between forty and fifty years ago, the proprietor of the island of *B.* raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil, without opposition: Held, that although the usage of forty years duration could not of itself establish such a right, or destroy the rights of the public, yet that it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words contained in those grants, served to establish such exclusive right. *Chad v. Tilsed*, 5 *J. B. Moore*, 129.

Heds of proofs.

POSTEA. See head JUDGMENT, in this table, *ante*.

PRESCRIPTION. As to what shall be deemed evidence of a private prescription, see *Morewood v. Wood*, 14 *East*, 327, n.

PRISON. See head BOOKS. Book of a public prison.

PROBATE OF A WILL; or letters of administration, proved by producing it, being an exemplification under the seal of the ecclesiastical court, unless the seal be denied; then it must be authenticated. *Kempton, d. Boyfield v. Cross, Ca. temp. Hardw.* 108.

And see head ADMINISTRATION. Letters of administration, in this table.

PROCLAMATION. Proved by producing a copy printed by the king's printer.

PROTEST. Foreign protest proved by production. This is a relaxation in favour of mercantile convenience.

RECORD. See observations prefixed to this table. Also head JUDGMENT, therein.

RECOVERY. See stat. 14 G. II. c. 20.

REGISTER OF MARRIAGE. See head MARRIAGE, in this table.

REGISTRY OF A DEED. Proved by an attested copy of the memorial of the registry; but it is not evidence of the contents of the deed; the memorial itself must be produced. *Hobhouse v. Hamilton*, 1 *Sch. & Lef.* 207.

ROLLS OF COURT BARON. See head COURT. Proceedings in a Court of Record, in this table.

RULE OF COURT. Proved by producing the same under the hand of the clerk of the rules. *Selby v. Harris*, 1 *Ld. Raym.* 745.

SEALS. Seals of superior courts. Prove themselves on production.

——. ——— of foreign states. Prove themselves on production.

——. ——— of foreign courts, when produced, should, on production, be authenticated.

SHERIFF. To connect sheriff with officer. In an action of debt against a sheriff, to recover penalties for the extortion of his officer, in taking a larger fee than was allowed on the discharge of a person out of custody on giving bail: Held, that the indorsement of the name of the officer on the writ, was sufficient to connect him with the sheriff, without shewing that such indorsement was made with his authority. *Bowden v. Waithman*, 5 *J. B. Moore*, 183. And see *Fermor v. Phillips*, *Id.* 184, n.

An examined copy of a writ returned and filed, and of the indorsement thereon, on which the writ is indorsed, apparently by the sheriff's authority, and the name of the bailiff em-

ployed to make the levy, is no evidence to prove who was the bailiff so employed by the sheriff, evidence not being added, that the indorsement of the bailiff's name on the writ itself, was made by the sheriff's authority. *Hill v. Middlesex Sheriff*, 7 *Taunt.* 8. Heads of proofs.

SURVEY. Surveys taken on public occasions, proved by production. See head **INQUISITION**.

TRANSFER OF A SHIP. It may be useful to remark, that the register of the transfer of a ship is no evidence of the transfer. *Fraser v. Hopkins*, 2 *Taunt.* 5. The bill of sale should be proved, and some testimony be adduced of acts of ownership, in order to charge a defendant.

TRESPASS. In trespass, a person who commits the trespass, but is not sued, is a competent witness for the plaintiff against his co-trespasser, without being released by the plaintiff. *Morris v. Daubigny*, 5 *J. B. Moore*, 319.

WAY, RIGHT OF WAY. Proved by reputation; or in case it be a public right of way, a verdict between other parties. *Reed v. Jackson*, 1 *East*, 355. Or usage as long as any one can remember, 2 *Atk.* 187. Twenty years is the general limitation of time of enjoyment of right of way. *Peake's Evid.* 317.

WILL OF FREEHOLD. The original will must be produced, and if it have been proved, a person from the proper office of the jurisdiction wherein the same was proved, must attend with such original. Evidence must be adduced to shew it to have been executed by the testator, or by some person for him; to have been attested by three credible witnesses; either at the same or at different times; that the witnesses subscribed their names in the presence of the testator, and that they all saw the same instrument executed.

To the foregoing proofs the party producing it will be most strictly held; and it will be observable, that one at least of the subscribing witnesses, if the will were executed by the testator in the presence of the witness; and the other subscribing witnesses should, if living, be called; but if the will were attested by the witnesses at different times, such a mode of attestation will call for the separate proof of such subscribing witnesses, if living.

And recognizing former decisions, it has been decided, that the wife of an acting executor taking no beneficial interest under the will, is a competent attesting witness to prove the execution of it, within the description of a credible witness, in the statute of frauds, 29 *C. II. c. 3. s. 4.* *Bettison v. Bromley*, bart. 12 *East*, 250. See also *Phipps v. Pitcher*, 2 *Marsh.* 20.

In case of the death of all the subscribing witnesses, evidence of their hand-writing, and of that of the testator, must be adduced, 2 *Stra.* 1109.

Quere. What is the period after which a will of lands appearing to be properly executed, may be read in evidence, without proof? See head **DEED**, *ad finem*, in this table, *ante*.

Heads of proofs.

WILL OF PERSONALTY. Proved by production of the probate, and that is evidence of the right of the party.

WRIT. Where a writ is the gist of the action, it must be returned and filed, and then, being a record, a copy of it is produced, as of any other record. See title **RECORD**.

Where it is only inducement to the action, its having issued is proved by the production of the writ itself.

EXACTION. See title **EXTORTION**, *ante*.

EXCEPTIONS. See titles **BILL OF EXCEPTIONS**, *ante*. **DEMURRER TO EVIDENCE**, *ante*.

EXCISE. See title **CUSTOMS AND EXCISE**, *ante*.

EXCOMMUNICATION. May be pleaded in abatement, and the judgment in that case is, that the plaint remain without day, until, &c.

What.

EXECUTION. See title **AMENDMENT**. In a practical sense, the general term. "execution" means the ultimate process prescribed by law for obtaining the fruits or object of a legal judgment.

This explanation is somewhat different from that more generally received; but it may be more strictly correct to call it the final process by which execution may be obtained, rather than *fructus, finis, et effectus legis*, *Co. Lit.* 289. Execution is a general term, including the names or titles of many writs or processes under which legal judgments are enforced or carried into effect, either against the person or the possessions of the party against whom the judgment is recovered. If against the person, the *capias ad satisfaciendum*; and also an attachment for non-payment of money; *The King v. Davis*, one, &c. 1 *B. & P.* 336, and the cases there cited; if against the lands, goods, and chattels, the *elegit*; if to obtain the possession of messuages, lands, or tenements, the *habere facias seisinam & possessionem*; and if against the goods and chattels, the *fieri facias & levare facias* are the proper writs of execution. See therefore the titles by which these several writs are distinguished.

The doctrine of execution extensive and important.

The law of execution is as extensive as it is important, yet in this place an abstract of those decisions applicable to the practice relating to execution generally, will only be subjoined: but those points which relate to a particular writ of execution, will probably be found by referring to such writ by its title.

And see title **EJECTMENT**, *ante*.

The general title "EXECUTION" may be further treated under the following sections, viz.:

- I. Of the period of the action at which execution may issue.
- II. Of the writ of execution generally. Practical points affecting the writ. The return of execution. Special or general execution under insolvent act. Action by and against the sheriff generally.
- III. By and against whom execution may be issued.
- IV. Of the relation of time back to execution.

- V. Of the parties' remedy in case of irregular execution. Re-stitution.
- VI. Of the duty of the sheriff or other officer, in relation to execution; and how far the court will protect him.
- VII. Of obstructing execution.

I. OF THE PERIOD OF THE ACTION AT WHICH EXECUTION MAY ISSUE.

Where judgment is given against one who is in view of the court or in Westminster-hall, it may be executed immediately, and the party taken or sent for into court and committed. *Anon. 3 Salk. 160.*

Where execution may immediately issue on judgment given.

Where a plaintiff, after being told it was not usual to obtain the *postea*, or to tax costs till the evening of the fourth day of term, obtained the *postea* before four o'clock on that day under a promise not to tax costs, and on pretence of wishing to effect the stamping, but instead of doing that, signed judgment and issued execution, the court set aside the judgment and execution, allowing the defendant all his costs occasioned by such proceeding. *Blanchenay v. Van Den Bergh, 1 B. & B. 298.*

Where issued under false pretences, set aside.

The court notified that for the future the *postea* shall not be delivered till the morning of the fifth day of term. *Id. ib.*

Where the defeazance on a warrant of attorney stated that it was given to secure the payment of a sum on demand, and that in case default should be made, judgment was to be entered up, and execution issued: held, that an actual demand must be made before the issuing of execution thereon, and that a proposal to the defendant to settle amicably does not amount to such demand. *Nicholl v. Bromley, 5 J. B. Moore, 307.*

Where previous demand necessary.

Where a defendant convicted of a misdemeanor is sentenced to be imprisoned for a certain term, and to pay a fine, and to be further imprisoned till the fine be paid, a writ of *lexari facias* may issue to levy the fine of the defendant's goods, chattels, and lands, even before the expiration of the term for which the defendant is sentenced to be imprisoned. *Rex v. Woolf, 1 Chit. R. 428.*

Where levied before pending term of sentence.

Execution cannot be sued after the expiration of a year and a day from the time the original judgment was given, except in certain cases to be presently mentioned; or where execution by the opposite party has been prevented without other process to warrant it. But a question has sometimes arisen, though not publicly, where the party has deferred signing a judgment to which he was entitled beyond the year and a day, and has issued execution on such judgment without *sci. fa.* The opposite party has thereby been taken by surprise, and I am unaware that such forbearance to sign judgment, when first entitled to it, is forbidden by any decision; *tamen quære* how far the spirit or meaning of the rule which requires *sci. fa.* on an old judgment is thereby evaded?

When *scire facias* necessary or not.

Judgment on a warrant of attorney entered in Easter Vacation against a defendant who died in Easter term is good; but a writ of execution tested after the defendant's death cannot be sued out upon the judgment till it be revived against the defendant's representative by *scire facias*. *Heapy v. Paris, 6 T. R. 368.*

No *scire facias* is necessary where the judgment is on statutes merchant and staple. *Bac. Abr. 729*; or where execution has

once issued within the year and continued down. *Aires v. Hardress*, 1 *Str.* 100.

And it will not be stayed until the trial of an indictment of perjury against two of the plaintiffs witnesses in the action. *Warwick v. Bruce*, 4 *M. & S.* 140.

II. OF THE WRIT OF EXECUTION GENERALLY. PRACTICAL POINTS AFFECTING THE WRIT. THE RETURN OF EXECUTION. SPECIAL OR GENERAL EXECUTION UNDER INSOLVENT ACT. ACTION BY AND AGAINST THE SHERIFF GENERALLY.

No order for change of attorney necessary.

A plaintiff may sue out execution by an attorney other than the attorney in the cause without obtaining an order for changing the attorney. *Tipping v. Johnson*, 2 *B. & P.* 357.

In a suit against two, jointly, the execution against both must be of the same kind. *Foster v. Jackson*, *Hob.* 59.

Where action brought on judgment.

If the plaintiff hath brought an action on the judgment he cannot take out an execution on that judgment until he hath discontinued the action of debt. *Bardus v. Satchwell*, *Bar.* 208.

After execution executed *quantum* cannot be referred.

It hath been held that after execution executed, though the judgment be for a penalty, the court cannot refer to the prothonotary to inquire what is due for principal, interest, and costs, and what is levied, in order to make restitution of the surplus without consent of the plaintiff; but the defendant must apply for relief to a court of equity. *Bevan v. Jones*, *Bar.* 204.

Where, after execution against the property it may issue against the person.

After issuing certain kinds of execution against the property of the party, under which the sheriff has levied without satisfaction of the judgment, an execution may issue against his person. *Foster v. Jackson*, *Hob.* 58, but not until the *fi. fa.* shall have been returned. *Miller v. Parnell and Elliott*, 2 *Marsh.* 78. And although he may have issued execution against the person a party is not prevented from issuing execution against the property; provided the execution against the person *shall not have taken effect*. *Foster v. Jackson*, *Hob.* 59. A *fi. fa.* and a *ca. sa.* may issue at the same time against the goods and the person of a defendant. *Primrose v. Gibson*, 2 *D. & R.* 193.

Where notwithstanding issue against person, execution may issue against the effects.

All writs of execution which are to be executed by the sole authority of the sheriff are good when duly executed though never returned by the sheriff. 3 *Bac. Abr.* 710; but if the party apprehends himself injured by an erroneous writ of execution he may apply to the sheriff to return it, and if he refuses, an action on the case lies against him. *Ward v. Hauchet*, *Keb.* 551.

Where executions good though not returned. Where action against sheriff for not returning execution.

If a plaintiff consent to the defendant's being discharged out of execution on his undertaking to pay at a future day, he cannot afterwards sue out an execution on that judgment in the event of the defendant's not fulfilling his undertaking. *Tanner v. Hague*, 7 *T. R.* 420. *Blackburn v. Stupart*, 2 *East*, 243.

Where defendant not liable to second execution.

The writ of *elegit* is not executed by the sole authority of the sheriff, but by an inquest taken by him. 2 *Bac. Abr.* 710.

Writ of *elegit*, how executed.

Where a *fi. fa.* is made returnable on a day out of term it may be amended by the award of execution on the roll. *Davey v. Hollingsworth and Another*, *T. 24 G. III. K. B.* 2 *Tidd*, 1015.

Of amending return.

An intervening term in the case of a return of writ of execution makes no discontinuance; and the reason assigned is, that it is unnecessary that the defendant should have a day in court; for his cause is at an end, and he must be in prison whether the writ be returned or not. *2 Bac. Abr.* 710.

Where no discontinuance.

If a *fiery facias* issue to the sheriff of S. returnable on a common return day, and he at the day returns *nulla bona*, a *fiery facias testatum* may issue the day following to the sheriff of Kent, and execution by him shall be good; for though on mesne process there can be no *testatum* till the *quarto die post*, yet is otherwise in writs of execution, for on these the party has no day in court. *Ib.*

When *testatum* execution may issue.

The party entitled may issue what execution he pleases, but regularly he cannot take out two different executions on the same judgment, nor a second of the same nature, unless upon failure of satisfaction on the first. *Id.* 717.

Of election of execution.

But the observation as to taking out two different executions on the same judgment must be qualified, for if the first execution be returned *nihil*, a second of the same nature may be issued. *Id.* 178. And see *2 D. & R.* cited page 692.

The plaintiff having sued out one writ of execution, may, before it is executed, abandon that writ and sue out another of a different sort; or he may have several writs of the same sort running against the defendant or his goods at the same time in different counties. But after the execution of one writ the plaintiff cannot sue out or proceed upon another of the same or a different sort until that which has been executed is returned; and then if a part only be levied upon a *fiery facias*, the plaintiff may have an *alias fiery facias* or other execution for the remainder. Or if the *capias ad satisfaciendum* be rendered ineffectual by the death or escape of the defendant, the plaintiff may have a new writ for the whole. And he may sue out and execute several *elegits* for lands in different counties. *2 Tidd*, 685, 5th edit.

Where a second execution may or not issue until the first be returned.

A general judgment signed by virtue of a warrant of attorney, given before the passing of an insolvent act of which the defendant is entitled to take advantage, by pleading in discharge of his person, &c. will not warrant a special execution under the act. But the court will give the plaintiff leave to plead the insolvent act for the defendant, and sign a special judgment under it; for the warrant of attorney will preclude the defendant from saying there is no debt. *Buxton v. Mardin*, 1 *T. R.* 80. And see *3 B. & P.* 185. Also *2 Tidd*, 1146.

Insolvent act, where special or general execution may or not issue.

The defendant, having given a warrant of attorney to confess judgment, took the benefit of an insolvent act, then became bankrupt, and obtained his certificate, after which the plaintiff entered up a general judgment and sued out a general execution, held regular, no dividend appearing to have been made. *Edmondson v. Parker*, 3 *B. & P.* 185.

Whenever by the levying the execution the party would be discharged from the debt or damages, the sheriff is liable in action to the party issuing the execution; in such action the sheriff cannot avail himself of the statute of limitations. *Bac. Abr.* 720. It may be brought for money had and received before the return of the writ. *Ib.* *Dalt.* 496. And see *Swain v. Mor-*

Action against or by sheriff.

EXECUTION; III. *By and against whom, &c.*

land, esq. 1 *Brod. & Bing.* 378, where it was ruled, that where goods had been seised under a *fi. fa.*, part of them sold on Saturday, and the remainder on Monday was put into the sheriff's hands at six o'clock, after the goods had been delivered to the purchasers, and the money received by the sheriff: held, that the execution was executed, and that the party who issued the *fi. fa.* might recover of the sheriff in an action for money had and received, the money levied under the sale.

The sheriff, after levy on the goods, has a possessory property in them, and he may therefore pursue his remedy against a trespasser, wrong doer, *Bac. Abr.* 720; but if he return *nulla bona*, and there is a recovery against him for a false return, that vests no property of goods in him. *Ib.*

Where defendant cannot levy costs.

The statute 43 *G. III. c. 46. s. 5*, does not enable a defendant to levy the costs of an execution for his costs of an action. *Baker v. Sydel*, 7 *Taunt.* 179.

Where sheriff's assignment protects property, yet in possession of debtor.

The property and goods of A. being in possession of the sheriff under a writ of *fi. fa.* he executed a deed of assignment to B. for a valuable consideration on which the execution was withdrawn. B. superintended the management of the property, but allowed A. to continue in possession, the same property was seised under a subsequent execution at the suit of C.: held, that such property was protected by the assignment to B. although A. had continued in the visible possession. *Jezeph v. Sussex (sheriff)*, 1 *J. B. Moore*, 189.

So where A. by deed assigned all his effects at W. to trustees for the benefit of certain creditors for four years, and the trustees were empowered to sell at the expiration of two years or sooner, if A. should direct, and apply the proceeds of the sale in discharge of the debts of such creditors who covenanted that A. might continue at home or abroad, and that they would not molest him for two years from the date of the deed: held, that such assignment was valid, and not within the statute 13 *Eliz. c. 5.* and that the property was thereby protected against a judgment creditor who had sued out execution against A. after the deed was executed. *Goss v. Neale*, 5 *J. B. Moore*, 19.

Nor can a distress on growing crops of corn of the vendee of the sheriff for rent accruing due to the landlord subsequently to the entry under the execution and sale, be sustained, unless such vendee allow the crops to remain uncut an unreasonable time after they become ripe. *Peacock v. Purvis*, *Id.* 79.

III. BY AND AGAINST WHOM EXECUTION MAY BE ISSUED.

Who entitled.

Only a party who is privy to the judgment, or entitled to the thing recovered as heir, executor, or administrator to him who has judgment may issue execution. 2 *Bac. Abr.* 723.

Where executors and not heir.

If a man has judgment for the arrearage of rent and dies, his executor shall sue out execution, and not the heir, for by the recovery it becomes a chattel vested to which the executor is entitled. *Id.* 724.

Where wife.

If a statute be entered into to husband and wife, and the husband die, the wife shall take out execution. *Ib.*

So if the husband and wife recover lands, damages, and the husband die, the wife shall have execution of the damage, and not the executors of the husband. 2 *Bac. Abr.* 724.

Where wife, and not executors of her husband.

If there are two persons entitled to issue execution, and the one prays a *capias ad respondendum*, and the other a *fieri facias*, it is said the *capias* shall be awarded. *Foster v. Jackson, Hob.* 61. The reasoning immediately following, *ubi sup.* is curious; yet notwithstanding its hallowedness, or perhaps for that very reason, the language of scripture has long ceased to be quoted as authority in our courts of law.

Where two are entitled, and each prays a different writ.

It need hardly be observed, that where an action is given to the head or representative of a corporate or chartered body, the right to issue execution on a judgment recovered by him in that capacity goes to his successors, and not to his executors. *Dr. Akins, president of the College of Physicians, v. Gardner, Cro. Jac.* 159.

Execution by corporate bodies

Against whom execution may and may not be issued. Generally if a man has judgment of debt against two he must take out a joint execution against both, and cannot have a *capias* against one, and an *elegit* against the other. *Roll. Abr.* 888; but if a man have a judgment for damages against two, and he sue out a *scire facias* against both, if one be returned summoned, and he make default, and it be returned, and the other have nothing, the plaintiff may have execution against him who made default for the whole. *Roll. Abr.* 890. So if it be returned that one of them is dead, he shall have execution for the whole against the other. *Ib.*

Where joint execution necessary.

Where not.

The plaintiff obtained a verdict in trespass against two defendants. Both were arrested on a joint *ca. sa.* for the amount of the damages. One was discharged on giving a promissory note to the plaintiff payable by instalments: Held, that this operated to discharge the other. *Ballam v. Price, 2 J. B. Moore,* 235.

Where judgment and execution against two, discharge of one, discharges both.

And bail are severally and jointly bound, and therefore execution may be taken out against either. *Roll. Ab.* 888.

Execution against bail.

If there be judgment against one who has lands in fee-simple, or if such an one acknowledge a statute and die, and his lands descend to his heirs, execution may be taken out against the heir, but his body is protected. 2 *Bac. Abr.* 725.

Execution against the heir or rather the lands of his ancestor.

So if there be judgment against one who dies intestate, or make an executor, a *fieri facias* lies against his goods in the hands of his administrator or executor. *Ib.*

Against goods in hands of executor, &c.

But neither an *elegit* nor a *capias ad satisfaciendum* lies against executors unless a *devastavit* be returned. 3 *Comm.* 414.

But in case of infancy of the heir, the execution seems suspended. *Roll. Abr.* 140. But a sequestration may, on proper application, issue out of Chancery. 2 *Ch. Ca.* 163, 164. See also *Co. Lit.* 290. And this privilege of infancy extends to where lands descend to coheiresses: for in this case, partition being made, the daughter of age shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution. *Co. Lit.* 290. *a.* So also if the consor of a statute merchant die, and his heir within age endow his mother, the land in dower shall not be extended during the minority of the heir. *Ib. Bro. Stat. Merch.* 33.

In case of infancy of heir.

Where mother endowed by heir within age.

Where infant liable to execution for costs.

Execution on judgment against baron and feme.

Where a feme covert will not be discharged.

Where the permitting another to use his name and goods, does not expose them to be taken in execution.

Execution against peers and privileged persons.

Quere, Levy money attachable.

Stat. 29 C. II, c. 3, s. 16.

Cases on this statute.

But where an infant sue by *prochein ami*, there was judgment against him for costs, he was held liable to a *capias ad satisfaciendum*. *Gardener v. Holt*, 2 *Str.* 1217; and also where there was no *prochein ami*. *Finley v. Jowle*, 13 *East*, 6.

If a person recover in trespass against baron and feme, execution may be sued out against the feme after the death of her husband. *Roll. Abr.* 890.

In an action against husband and wife, they may both be taken in execution, and the wife shall not be discharged unless it appear that there is fraud and collusion between the plaintiff and her husband to keep her in prison. *Pitts v. Meller and Ux.* 2 *Str.* 1167, and the cases there cited. *Wilmot v. Butler and Wife*, 1 *Say.* 149.

If a feme covert be taken in execution under a warrant of attorney given by her as a feme sole, the court will not discharge her on a summary application. *Wilkins v. Wetherill*, 3 *B. & P.* 220. So also where interlocutory judgment was obtained in *assumpsit* against a feme sole, final judgment was entered, and execution may issue against her as feme sole, although she marry before the suing out the same. *Cooper v. Huneikin*, 1 *Smith*, 282.

But it has been held, that where A. having assumed B.'s name, and passed for his wife, and permitted him to appear to be the owner of goods taken in execution in the house in which A. and B. lived, such goods being her property, were not liable to be taken in execution against B. *Edwards v. Bridges*, 2 *Stark.* 396.

It need hardly be observed that the persons of peers, and also during privilege of parliament that of members of parliament, cannot be taken in execution. But as to their liability to other execution, see stat. 10 G. III. c. 50.

So a servant in the king's household, liable to be called upon to attend the person of his majesty, cannot be taken in execution, and therefore may not justify as bail. *Anon.* 1 *D. & R.* 127.

But a gentleman of the king's privy chamber, not being a menial servant, and having no stated duties to perform, nor receiving fees in virtue of his office, nor having any writ of privilege, is liable to execution. *Tapley v. Battine*, *Id.* 79.

As to whether money levied under an execution be subject to foreign attachment, see *Gwinness and Others v. Brown and Others*, 4 *Taunt.* 472.

IV. OF THE RELATION OF TIME BACK TO EXECUTION.

As to goods and chattels, it is enacted by stat. 29 C. II. c. 3, s. 16, that no writ of *fiery facias*, or other writ of execution, shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed. And for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies, and agents, shall, upon the receipt of any such writ without fee for doing the same, indorse upon the back thereof, the day of the month or year whereon he or they receive the same.

It has been determined, that the property of the goods is not altered by this statute, but continues in the defendant till the

execution executed. The meaning of the words, "That no writ of execution shall bind the property, but from the delivery of the writ to the sheriff," is, that after the writ is so delivered, if the defendant make an assignment of his goods, unless in market overt, the sheriff may take them in execution. 2 *Eq. Ca. Abr.* 321. And it should seem, that by execution executed, is intended sale; for it is distinctly laid down, that by mere seizure by the sheriff under a *fi. fa.* no property is altered. See *Thurston v. Mills*, 16 *East*, 254. *Wells v. Allnut*, *ibid.* 278.

This statute protects only goods in the hands of purchasers, where the goods are sold *bonâ fide*; for if the party die after the *teste*, but before the delivery of the writ to the sheriff, the goods are bound in the hands of his executors; for this is not a change of property by sale or for a valuable consideration. *Comb.* 145.

Stat. 49 G. III. c. 121. has effected a very important alteration in the former law, respecting the levying execution against the property of a defendant, afterwards declared bankrupt. Formerly the executions levied in such cases, were often contested with much loss and inconvenience to *bonâ fide* creditors, and not always with advantage to the bankrupt's estate; the principal question to be determined by these litigations, was, whether an act of bankruptcy had been committed previously to the delivery of the writ of execution to the sheriff.

Stat. 49 G. III. c. 121, as to executions where defendant afterwards bankrupt.

The old law upon this question is comprised in the following decision. If a writ of execution be delivered to the sheriff, and the defendant become bankrupt before it is executed, the execution is thereby superseded, and the goods are not bound by the delivery, for the property ceases to be in the bankrupt from the time of the act of bankruptcy committed. *Smallcomb v. Cross*, 1 *Ld. Raym.* 251, 252.

Old law upon this question.

The act of bankruptcy upon which the commission was found, was not considered conclusive; but if evidence could be given of an act of bankruptcy prior to such delivery of the writ of execution of the sheriff, the creditor not only lost all the benefit he had expected to obtain by his judgment, but it may be truly said, a door was wide open for fraud and perjury.

By the above statute, sect. 2. in all cases of commissions of bankrupt, all executions and attachments against the lands and tenements, or goods and chattels of the bankrupt *bonâ fide* executed or levied more than two calendar months before the date and issuing of such commission shall be valid and effectual, notwithstanding any prior act of bankruptcy committed by such bankrupt in like manner, as if no such prior act of bankruptcy had been committed, provided the person at whose suit such execution or attachment shall have issued, had not, at the time of executing or levying the same, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent or had stopped payment, provided always that the issuing of a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed such notice, if it should appear that an act of bankruptcy had been actually committed at the time of issuing such commission.

And see stat. 5 G. IV. c. 98. s. 78.

V. OF THE PARTIES' REMEDY, IN CASE OF IRREGULAR EXECUTION. RESTITUTION.

Where an action was held, to be against the plaintiff.

An action will lie for taking out execution on a judgment which the plaintiff knows to be satisfied. See *Waters v. Freeman*, *Hob.* 205. 266.

But not against the sheriff.

And where a man had judgment and execution executed, and afterwards the judgment was vacated for being unduly obtained, and restitution awarded, and afterwards the defendant brought trespass against the plaintiff in the first action for the taking of the goods, it was adjudged that it well lay against the party. But in this case it was held, that no action would lie against the sheriff, who had the king's writ to warrant what he did. *Turner v. Felgate*, *Sir T. Raym.* 73.

Where two executions issue against different persons for same damages.

Where plaintiff sued out two several writs of *testatum fi. fi.* at the same time into different counties against two defendants, and the sheriff under each of them took possession of the goods of one of the defendants, it appearing that the plaintiff's object was merely to obtain payment of his debt, and that he was willing to allow the defendant the full benefit of all monies levied under the writ in one county, before he would call on the sheriff to return the writ issued into the other; the Court of Exchequer, under these circumstances, refused to put the plaintiff to his election which of the writs he would proceed under, and to set aside the other for irregularity. *Cooper v. Rowe and Another*, *T.* 51 G. III. in *Sacc.* 2 *Tidd*, 1011.

Where writ quashed or set aside.

A writ of execution taken out for too large a sum can in general only be quashed for the excess; but where a *ca. sa.* was indorsed to levy the penalty of a warrant of attorney, where a defeazance only authorized execution for the arrears, the rule was made absolute for setting aside the execution *in toto*. 1 *Chit. R.* 150 a.

What the sheriff may plead if sued in trespass. And the bailiff or one assisting him.

Where however it shall be deemed proper to sue the sheriff in trespass, it has been held, that it is enough for his justification to shew a writ. So it is in the case of his bailiff or officer, with this difference, that the sheriff must shew the writ was returned if returnable; but the bailiff need not, because it was not in his power. 2 *Bac. Abr.* 5th edit. 740. And it seems that if one come in aid of the officer, at his request, he may justify as the officer may do; but such request or command of the officer is traversable. *Ib.*

The remedy for irregular execution of a particular writ.

For remedy in case of irregularity in respect of the issuing or execution of any particular writ, see such writ by its title: but generally, if a writ of execution be irregular, the defendant may move the court to set it aside, and that the person, goods or money, taken or levied, may be discharged or restored. Or in vacation, he may obtain an order or summons.

A defendant was discharged out of custody on a *ca. sa.* on the ground that the writ recited a prior *fieri facias* and levy, but omitted the sheriff's return, but terms were imposed on him to bring no action of trespass. *Wilson v. Kingston*, 1 *Chit. R.* 134 a.

And a *fi. fa.* issued on a judgment entered up and executed, where a defendant in an action of tort, in which a verdict had been taken against him, subject to an award, became bankrupt, between the verdict and making the award, was set aside on the terms of the

defendant's undertaking to bring no action against the sheriff, on the ground that the plaintiff might have proved the damages recovered under the commission by production of the record. *Beeston v. White*, 7 *Price*, 209.

On setting aside judgment and execution for irregularity, the court will restrain the defendant from bringing an action of trespass, unless a strong case of damages be shewn. *Lorimer v. Lule*, 1 *Chit. R.* 134. *Wilson v. Kingston*, *Id.* 134 *a.*

Where party restrained or not from bringing action.

But on setting aside a *fi. fa.* for irregularity, on the ground of an allowance of a writ of error, the court will set aside the execution, leaving the defendant at liberty to proceed against the sheriff for misconduct in the levy. *Simmons v. Johnson*, *Id.* 135, *n.*

If a writ of execution appears by the return to have been improperly executed, the court will quash it the term the return is filed. *Pullen v. Purbecke*, 1 *Ld. Raym.* 346.

Of quashing execution.

The law relating to this head may properly be arranged under the particular writ by which the property, the supposed object of restitution, was seized. See title *ELEGIT*, *ante*.

Of restitution where execution set aside.

But where a defendant was taken in execution after his certificate was signed, but before it was allowed, and paid the debt and costs to the sheriff, the court, on application, refused to relieve him. *Neatly v. Eagleton*, *E.* 24 *G. III.* K. B. 2 *Tidd*, 1026.

Where execution after certificate signed.

VI. OF THE DUTY OF THE SHERIFF OR OTHER OFFICER, IN RELATION TO EXECUTION; AND HOW FAR THE COURT WILL PROTECT HIM.

Where the sheriff having notice not to sell, under a *fi. fa.* applies for an indemnity, which being refused, he makes sale, the court will interpose to protect him. *King v. Sheriff of Middlesex*, 1 *J. B. Moore*, 43.

Of sheriff's indemnity.

If the assignees of a bankrupt claim goods taken in execution, and the assignees and the plaintiff in the execution both refuse to indemnify the sheriff, the court will interfere to protect him. *Mac George and Others, Assignees, &c. v. Birch*, 2 *Taunt.* 585.

If the plaintiff die after execution delivered to the sheriff, he must still proceed to make the levy; but if the plaintiff make no executor, or if no administration be taken out, the money must be brought into court, and there deposited until, &c. 2 *Ld. Raym.* 1073.

Where if plaintiff die sheriff must proceed.

The sheriff is bound *ex officio* to levy the fine imposed upon a defendant on his conviction for a misdemeanor; at all events the writ of *levari* is regular, when it has been adopted on the part of the crown. *Rex v. Woolf*, 1 *Chit. R.* 583.

Where sheriff bound to execute *levari facias*.

But where the court would not grant an attachment against the sheriff for not returning a writ of execution issued under a statute of hue and cry, 8 *G. II. c.* 16, see *Wright and Another v. The Inhabitants of the Lathe of St. Augustine, &c.* 13 *East*, 544. It appeared in this case that the sheriff had, pursuant to the statute, delivered the writ to the justices, &c. who had done nothing thereupon, and the court said that the next proceeding is against the magistrates.

The stat. 56 *G. III. c.* 50, although passed for the purpose of general good and public benefit, in promoting good husbandry, does

Where the crown not bound by stat. 56 *G. III.*

c. 50. Growing crops.

not extend to bind the crown; therefore sales of goods seized under prerogative process are not within it, and the sheriff must sell unconditionally; nor can the sheriff sell crops as subject to tithe; he must sell without any qualification. *Rex v. Osborne*, 6 Price, 94.

Where sheriff begins he must finish execution.

The sheriff or officer who has proper authority to begin an execution, is compellable to proceed in the same. 2 *Bac. Abr.* 735, where the several statutes are referred to. Hence it hath been adjudged, that if a sheriff on a *fi. fa.* seizes goods under his hands to the value of the debt, and pays part of the debt, and is discharged without having sold the rest of the goods, or having returned his writ, that notwithstanding such discharge, and without any writ of *venditioni exponas*, he may sell the goods remaining in his hands, and such sale and execution shall be good by force of the writ of *fi. fa.* *Ayre v. Aden*, *Cro. Jac.* 73. *Dalt.* 19. See *Wilbraham v. Snow*, 2 *Saund.* 47.

Where seizure and sale under a second, first *fi. fa.* must be satisfied.

Though a sheriff make a warrant and seizure of goods under a *fi. fa.* last delivered to him, yet the plaintiff in a *fi. fa.* first delivered to the sheriff is entitled to be satisfied out of that seizure. *Jones v. Atherton*, 7 *Taunt.* 56.

If a second *fi. fa.* be delivered to a sheriff after he has the defendant's goods in possession under the prior *fi. fa.* of another, the goods are bound by the second execution, subject to the first execution from the date of the delivery of the last writ to the sheriff. *Id. ib.*

And that without warrant on the second writ or further seizure. *Id. ib.*

Where sheriff discharged.

It has been sufficiently seen, that appointing a special bailiff discharges the sheriff. See titles ARREST, BAILIFF, &c. *ante*. So the sheriff is discharged by the plaintiff's appointing a special bailiff and agent to manage the sale, although the sheriff returned that he had sold, and that he had paid the sum illegally deducted for the auction. *Pallister v. Pallister*, 1 *Chit. R.* 614, *n.*

Where sheriff must retain or pay over one year's rent for landlord.

Under statute 8 *Anne*, c. 14. the sheriff is bound to retain one year's rent out of the proceeds of a tenant's goods taken in execution, provided he has notice of the landlord's claim at any time while the goods or the proceeds remain in his hands, and the court, on motion, ordered such rent to be paid to the landlord out of the proceeds, though notice was not given to the sheriff until after the removal of the goods from the premises. *Arnitt v. Garnett*, 3 *B. & A.* 440.

If a sheriff, knowing that rent is due to the landlord, proceed to sell the tenant's goods under a *fi. fa.* without retaining a year's rent, he is liable to the landlord for it, under stat. 8 *Anne*, c. 14. although no specific notice has been given him by the landlord that such rent is due to him. *Andrews v. Dixon*, 3 *B. & A.* 645.

The trustees of outstanding satisfied terms assigned in trust to attend the inheritance, may sue the sheriff for not retaining a year's rent due to the landlord, after notice so to do, in an execution against the tenant, and a notice to the sheriff stating that the rent was due to J. S. and the mortgagees of his estate, and signed by a person who was not the receiver appointed by the mortgage deed, is sufficient, and the sheriff is liable if he remove any of the te-

nant's goods without retaining the year's rent. *Colyer v. Speer*, 2 B. & B. 67.

Where goods seized under an execution have been kept by the sheriff's officer on the premises, pending a reference of the prosecutor's claim, during which a sum of money accrues due to the landlord for rent, the Court of Exchequer refused to interfere in his behalf, to order the rent to be paid him out of the produce of the sale, because he might bring an action for use and occupation against the tenant, or case against the officer. *Rex* (in aid of *Mytton*) *v. Hill*, 6 Price, 19. And see *Lane v. Crockett*, 7 Price, 566. *Harrison v. Barry*, *Id.* 660.

I have adopted the following section, and made additions, 1st, because of the importance and daily occurrence of the points therein comprized; 2d, because the cases cited therein still seem to be law.

It is laid down as a general rule in our books, that the sheriff, in executing any judicial writ, cannot break open the door of a dwelling-house. This privilege, which the law allows to a man's habitation, arises from the great regard the law has to every man's safety and quiet, and therefore protects them from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect; and hence it is, that every man's house is called his castle.

Where sheriff may, or not, break the door.

This general position has been frequently acted upon. In Trin. Term, 17 G. III. the court set aside an execution because the officer forcibly broke into the house to execute the writ. *Gates v. Delamayne*. So in a late case, accompanied indeed with extreme and unnecessary violence, and, as appeared in evidence, where the outer door was forced, the bailiffs were indicted, and found guilty. And see *John Johnson v. Leigh*, 6 Taunt. 246.

And if the sheriff continue in possession after the return day of the writ, that irregularity makes him a trespasser *ab initio*, but will not support the allegation of a new trespass committed by him after the acts which he justifies under the writ of execution. *Aitkenhead v. Blades*, 5 Taunt. 198. 1 Marsh. 17. S. C.

But having entered at the open door of an house, the sheriff need not demand to have the inner doors opened to him, before he break them in order to take, under a writ of *fi. fa.* goods which are within them. *Hutchinson v. Birch* and Another, *Sheriffs of London*, 4 Taunt. 619.

A sheriff may enter a house to search for the body of a debtor under a writ of *capias ad satisfaciendum*. *Id. ib.*

So also, upon great suspicion, he may enter the house of an administratrix, who shall not be deemed a stranger, although he find no goods there; and to remain therein two days was held not an unreasonable time. *Cook v. Birt*, *Sheriff of Surrey*, 1 Marsh. 333.

And where the body is taken, it seems, that so the defendant be actually confined in the sheriff's custody, although neither in a lock-up house nor in a public prison, such custody will be deemed a legal remaining in prison, so as to found an act of bankruptcy. See *Stevens v. Jackson and Others*, *Id.* 469.

But yet in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of

EXECUTION; VII. *Of obstructing Execution.*

the king and commonwealth are concerned, this general case (the position above-mentioned) hath the following exceptions:

1. That whenever the process is at the suit of the king, the sheriff or his officer may, after request to have the door opened and refusal, break and enter the house, to do execution, either on the party's goods, or take his body, as the case shall be.

2. So in a writ of seisin, or *habere facias possessionem* in ejectment, the sheriff may justify breaking open the door, if he be denied entrance by the tenant; for the end of the writ being to give the party full and actual possession, consequently the sheriff must have all power necessary for this end; besides in this case the law does not, after the judgment, look upon the house as belonging to the tenant, but to him who has recovered.

3. Also this privilege of a man's house relates only to such executions as affect himself, and therefore if a *feri facias* be directed to the sheriff to levy the goods of A. and it happen that A.'s goods are in the house of B. if after request made by the sheriff to deliver these goods, he refuse, the sheriff may well justify the breaking and entering his house.

4. Also this privilege extends to a man's dwelling-house, or out-house adjoining thereto, and therefore it hath been adjudged that the sheriff, on a *feri facias*, may break open the door of a barn, standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close, &c.

5. So on a *feri facias*, when the sheriff or his officers are once in the house, they may break open any chamber-door or trunks, for the completing the execution.

6. So if the sheriff's bailiffs enter the house, the door being open, and the owner locks them in, the sheriff may justify breaking open the door for the enlarging and setting at liberty the bailiffs; for if in this case he were obliged to stay till he could procure a *hamine replegiando*, it might be highly inconvenient; also it seems that in this case the locking in the bailiffs is such a disturbance to the execution, that the court will grant an attachment for it.

7. That if the sheriff, in executing a writ, breaks open a door where he has no authority for so doing by law, yet the execution is good, and the party has no other remedy but an action of trespass against the sheriff.

See *Semaine's Case*, 5 Co. 91.

VII. OF OBSTRUCTING EXECUTION.

Of commitment
for contempt.

The original commitment for contempt is grounded from the stat. *Westm. 2. c. 39*. This statute enables the sheriff, in the case of executions only, as it is said, to call out the *posse comitatus*. For since the sheriff was to commit those who resisted the process, the judges who awarded such process must have the same authority to vindicate it. Hence, if any one offers any contempt to this process, either by word or deed, he is subject to imprisonment during pleasure, viz. a *qua non deliberetur sine speciali precepto domini regis*; so that notwithstanding *magna charta*, which provides that none be imprisoned *sine judicio parium vel per legem*

terra, to commit for contempts, is one part of the law of the land, confirmed by this statute. 2 *Inst.* 454. 2 *Bac. Abr.* 738.

And the court will on affidavit grant an attachment against the party, whether he be the defendant or a stranger who disturbs the execution.

Where court will grant an attachment on a summary application.

See titles ANNUITY. ERROR. FIERI FACIAS, sect. III. HABERE FACIAS POSSESSIONEM. POUNDAGE. PRISONER. WARRANT OF ATTORNEY, sect. II.

EXECUTOR AND ADMINISTRATOR.

The question of capacity or incapacity of a person to assume the character of executor, though left very large by the English law, and differing widely in this respect from the civil law, may become a very material one at the commencement of an action at the suit of an executor.

Sect. 1. of stat. 9 & 10 *W. III.* c. 52. whereby such disability was created, is, by stat. 53 *G. III.* c. 160. s. 2. wisely repealed. Few instances are to be found in the books, of a law so foolish, having been more foolishly enforced. The stat. 9 & 10 *W. III.* made denial of the Trinity, work disability to become an executor, &c.

It is said to have been doubted whether an alien enemy may become executor, but the better opinion seems to lean that he may. *Brocks v. Phillips*, *Cro. Eliz.* 684. An executor or administrator must of course be *compos mentis*. *Salk.* 36. See title DEVASTAVIT, *ante*.

A. the widow of an officer who died intestate in India, obtained letters of administration of her husband's effects in the Recorder's Court at Bombay, and remitted the proceeds of the effects in government bills to her agent in England. B. a creditor of the intestate, took out letters of administration in this country of the intestate's effects, and brought an action against the widow's agent for money in his hands, part of the intestate's effects; held, that the Indian letters of administration prevailed over those granted in England, and that the action would lie only at the suit of the widow. *Currie v. Bircham*, 1 *D. & R.* 35.

The authority of an administrator appointed according to stat. 38 *G. III.* c. 87. during the absence of an executor from this country, does not become actually void upon the death of such executor, but only voidable. *Taynton v. Hannay*, 3 *B. & P.* 26.

An executor stands in the place of his testator, and represents him as to all his personal contracts, and therefore may regularly maintain any action in his right which he himself might. *Bac. Abr.* tit. Executor and Administrator.

Action by executor.

By stat. 32 *H. VIII.* c. 37. they may sue for and recover arrears of rent, &c. *Co. Lit.* 162 *a*. Executors may also bring trespass for trespass. By 4 *E. III.* c. 7. reciting that in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished, the executor, in such cases, shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be should have had if they were in life.

For what executor may sue.

They may also bring *trover* for the goods of the deceased, *Cro. Eliz.* 377; and this though the defendant took the goods before

probate or administration committed; the possession must be alleged in the testator or intestate. *Bac. Abr. ante*, page 703; and whether the conversion happen before or after the testator's death, if the goods when recovered will be assets in the hands of the executor, he may sue for them in that character.

They may also have action for covenant broken in the life-time of the testator or intestate. 2 *Lev.* 26.

So, also, it is said they may bring ejectment. *Bac. Abr. ub. sup. Sed query de hoc. ibid. n.*

But the personal representative of a tenant from year to year, as long as both parties please, may maintain an ejectment. *Doe v. Porter*, 3 *T. R.* 13.

So if a lord of a manor assess a fine upon a copyholder for his admittance, and die, his executor may bring an action for it. *Evelyn, Bart. v. Chichester*, 3 *Burr.* 1717.

Where executors pay a sum of money on the testator's account, which they need not have done, and afterwards bring an action to recover it back again, they must declare in their own right, and not as executors. *Murd v. Stokes*, 4 *T. R.* 565.

But cannot join his own right of action with his testator's.

An executor cannot in the same action join a demand in his own right with one in the right of the testator. *Cockerill and Wife, administratrix, v. Kynaston*, *Id.* 280. *Petrie, executor, v. Hannay*, 3 *T. R.* 659; yet it is the constant practice to join in the same declaration several counts for money had and received by the defendant to the use of the testator, and to the use of the executor *as such*. *Ib.* A count on an *insimul compulsasset* with the plaintiff as executor, may be joined with a count for goods sold by the testator. *Thompson v. Stent*, 1 *Taunt.* 322.

The criterion whether the counts are misjoined is, whether the money, if recovered, will be assets in the hands of the executor; and if it will, the executor, declaring as such, is not liable to the costs of those counts on which assets will be recovered. *ib.* But he may recover in his own name money due to the testator in his life-time, and received by the defendant afterwards. *Shipman v. Thompson*, *Wils. Rep.* 103, 4; and in this case the defendant cannot set off a debt due to him from the testator. *Ib.*

Observation as to the *debet* and the *detinet*.

It is said, that if an executor bring action of debt for any thing in right of the testator, it must be in the *detinet* only. 5 *Co.* 32. But from a modern decision it may seem that in K. B. at least, and where the proceeding is by bill, if the action be also laid in the *debet*, the same cannot be taken advantage of on demurrer; it being decided that the *queritur* is superfluous, and may be rejected. *Lord v. Houston*, 11 *East*, 62. After this decision it may seem that very numerous cases and *dicta* upon whether the action should be laid in the *debet* and *detinet*, cease to be law. In actions by original K. B. and in C. P. the old distinctions may probably yet be maintained; but it is satisfactory to observe these stumbling blocks, besetting the ways of justice, gradually rotting. *

* It would be a curious and not an uninteresting essay, to hear something of this title. "Of the history of forms, and the abolition or modifications of those no longer applicable to the pre-

sent administration of justice." But in the eye of the lawyer who can think, forms are too often dear from their antiquity; they are addressed to his taste, as well as to his habits. By the

The probate must be obtained to enable the party to sue for debts. *Anon. Loffl*, 81; and the only way of proving a right to personal property under a will is by the probate. *The King v. the Inhabitants of Nethershal*, 4 *T. R.* 258. 260. A probate, as long as it remains unrepealed, cannot be impeached in the temporal courts. *Allen v. Dundas*, 3 *T. R.* 125. And an executor's right is derived from the will; the probate is only evidence of it, therefore he has a constructive possession from the testator's death. *Smith v. Milles*, 1 *T. R.* 475. 480; and therefore may, I apprehend, sue a writ before probate obtained.

Where probate necessary. As to its being evidence, &c.

Where an executor has obtained probate of a will with notice that the testator had made a subsequent will, appointing another executor, and he acted by taking possession of the testator's effects; held that the executor under the second will, who had obtained probate, might maintain trover for the effects so taken possession of. *Woolley v. Clark*, 1 *D. & R.* 409.

Where there are *bona notabilia* in several dioceses in the same province, the prerogative court must grant administration; but where in one diocese of one province, and in another diocese of another province, each bishop must grant administration. *Burston v. Ridley*, 1 *Salk.* 39.

An examined copy of the act book in the registry of the prerogative court of Canterbury, stating that administration was granted to the defendant of her husband's goods, at such a time, is proof of her being such administratrix in an action against her as such, without giving her notice to produce the lettefs of administration. *Davis v. Lady Elizabeth Williams*, 13 *East*, 232. *Ray v. Clerke*, 1*b.* 238, *n.*

As to what will be evidence of a person being administratrix.

In actions brought by executors and administrators, it is usual to make profert of the probate, or letters of administration; and although the want of profert is matter for special demurrer, yet it is aided, after verdict, by the express words of stat. 16 & 17 *Car.* II. c. 8. extended by stat. 4 *Anne*, c. 16. to judgments by confession, *nil. dicit* or *non sum informatus*. And the omission of profert shall not impede the judgment, except the same shall be specially shewn for cause of demurrer. Same statute.

Of profert.

In *Crawford v. Whittall*, 1 *Doug.* 4, *n.* it was ruled, that if a plaintiff declare as administrator where he need not, the want of

mere practising lawyer, who has little time or opportunity for thinking about them, forms are taken as they are found. Whether they originated in utility, as most likely they did; whether they were continued from pertinacity even after their uses had evaporated, he never stops to inquire. But it is surely time that principle should be allowed to pervade practice as it is pervading every thing else. If already good, principle cannot disturb it; if it be yet bad, the application of principle in the investigation of the uses of some forms would very soon be a mean of separating the chaff from the grain; and then what a heap of

chaff, some official ones, those relating to error, &c. &c. for instance, would grow under our eyes. The administration of justice should be something else besides being made a pretext for taking money out of the suitors pocket to put it into those who do nothing to merit, but appoint deputies to receive it. One of the offensive anomalies in practice is, the fine received by somebody upon original writs. I have not thought it worth while to trace this unearned emolument to the hands into which it ultimately subsides. It is an exaction which the legislature ought instantly to abolish; upon compensation. See title ORIGINAL.

EXECUTOR AND ADMINISTRATOR.

proferit is no objection, even on a special demurrer. See also *Bonafous v. Walker*, 2 T. R. 126. 128, n.

Where a defendant was described in process generally, he may be declared against as administrator, the object of the writ being merely to bring him into court. *Watson v. Pilling*, 6 J. B. Moore, 66.

An action of assumpsit cannot be maintained by a surviving executor in his own right against the surviving partner of a deceased co-executor, without stating him to be a surviving partner. *Fitzgerald v. Boehm*, *Id.* 332.

In avowing as executor or administrator under the statute of 32 H. VIII. c. 37. s. 1. it is not necessary for the defendant to state for what term the tenant held the premises. *Quære* whether this statute applies to rents arising out of terms for years? *Meriton v. Gilbee*, 8 Taunt. 159.

Of actions by
and against exe-
cutors, &c.

If several executors be named, one cannot sue alone until the others have renounced. *Hunt v. Stokes*, 4 T. R. 565. But they all should join, though one only have probate. See *Brookes v. Stroud*, 1 Salk. 3.

An administrator *pendente lite* about a will may bring actions. *Woollaston v. Walker*, 2 Str. 917.

See *Currie v. Bircham*, 1 D. & R. 35; cited page 703, *ante*.

There is a distinction as to the period at which an administration and executorship *durante minoritate* cease; the functions of the administrator cease not until the party entitled becomes 21; those of the executor on such party's attaining 17. *Atkinson v. Cornish*, 1 Ld. Raym. 338. *Freke v. Thomas*, *Ib.* 667; and a temporary administrator must, in actions brought by him, shew that his administration continues, and the omission will be fatal on demurrer. *Beale v. Simpson*, *Ib.* 408.

It is very important to be recollected, that an administration granted by a peculiar, will not entitle the administrator to sue upon judgment. *Adams v. Terre-tenants of Savage*, 2 Ld. Raym. 854. By a peculiar is meant an exempt jurisdiction. 1 Still. 336.

And though by the statute of frauds, an executor is not liable personally without a written promise, yet such written promise does not render him liable at all events unless there be an adequate consideration. *Rann v. Hughes*, 5 T. R. 350, n. nor need they find bail on error. *Ib.*

They cannot be held to bail except on *devastavit* returned, *ib.* or on a personal promise; but the affidavits must be positive. *Mackenzie v. Mackenzie*, 1 T. R. 716.

Nor can a personal representative be sued in the county court of Middlesex. *Ailway v. Burrows*, 1 Doug. 163. As to their being sued in the *debet* and *detinet*, see *ante*, page 704.

An administrator cannot be sued in debt upon a simple contract of his intestate. *Barry v. Robinson*, 1 N. R. 293.

An executor having pleaded *non assumpsit* and a specialty which covered the assets, will be permitted to withdraw the first plea on payment of such costs only as were occasioned by that plea. *Dearne v. Grimp*, 2 Bla. Rep. 1275.

An administrator defendant may give retainer in evidence, under the plea of *plene administravit*, or he may plead it at his liberty. *Plumer v. Marchant*, 3 Burr. 1380.

A submission to an award by an administrator, is not an admission of assets. *Pearson v. Henry*, 5 T. R. 6. See however *Smale's Executors v. Waite*, *Willes*, 317, *n. a.*

A promise by an administrator to pay the debts of the intestate if there be no assets, is *nudum pactum*. *Pearson v. Henry*, 5 T. R. 6.

In an action against an administrator on promises of the intestate, an *insimul computassent* with the administrator as such, of money due from the intestate, does not make him personally liable. *Secar v. Atkinson*, 1 H. Bla. 102.

Paying interest on a bond due from testator, is not conclusive evidence of assets. *Cleverly v. Brett*, 5 T. R. 8, *n.*

And where the plaintiff had demurred to a plea of *puis darrein continuance* pleaded by an executor, who had obtained judgment thereon, the court refused to allow the plaintiff to withdraw the demurrer, and take judgment of assets *quando acciderint*. *Prince v. Nicholson*, 6 Taunt. 45.

Nor where A. and B. make a joint and several promissory note, and after the lapse of six years A. dies, leaving B. one of his executors, and B. subsequently pays interest on the note not in his executorial character, but personally; as a maker of the note: Held, in an action by the executors of the payee of the note, against A.'s executors, alleging, first, a promise by the testator in his life-time, and, second, a promise by the executors, after his death, that the payment within six years of interest by B. (who suffered judgment by default) was not sufficient to take the case out of the statute of limitations as against the executors. *Atkins v. Tredgold*, 3 D. & R. 200. 2 B. & C. 23.

But where two makers of a promissory note gave it to a creditor of their testator, whereby "as executors they severally and jointly promised to pay on demand, with interest:" Held, that they were personally liable. *Childs v. Monins*, 5 J. B. Moore, 282.

Other questions as well as many that may arise as to suits and actions against an executor or administrator, seem distinctly to relate to the pleadings therein, and they are therefore purposely omitted for a reason often already assigned, viz. That on such questions the practitioner will seldom rely on his own researches. Of the pleadings in such actions.

Executors cannot plead judgments to a *scire facias*, which they might have pleaded to the action. *Earle v. Hinton*, 1 Stra. 732.

Of course an executor confessing or allowing judgment to go by default, admits assets. See *Skelton v. Hawling*, 1 Wils. 258.

Where executor or administrator is charged as assignee, the judgment is *de bonis propriis*. *Tilny v. Norris*, 1 Ld. Raym. 593, but where he is charged as executor, though he might have been charged as assignee, the judgment is *de bonis testatoris*. *Buckley v. Pirth*, 1 Salk. 316. Judgment against executors, &c.

On a count averring an account stated by the defendant of monies due from him as executor, the judgment shall be *de bonis testatoris*. *Powell v. Graham*, 7 Taunt. 580.

It may be therefore joined with counts on promises of the testator. *Id. ib.*

Declaration by executor on bond, delivered on the 1st February, sham plea on the 6th, of an assignment of the bond before the death of the testator, and payment to the assignee, defendant ruled to abide by plea on the 16th; replication took issue on the payment pleaded, and plaintiff entered a *similiter* for the defendant; *similiter* struck out by the defendant, who filed demurrer to the replication: Held, notwithstanding the plaintiff's delay, that he might sign judgment as for want of a plea, and the court ordered plaintiff's attorney to pay the costs. *Corbett v. Powell*, 1 D. & R. 448.

And where, as against executors, court will allow judgment to be signed *nunc pro tunc*, see title NUNC PRO TUNC.

Upon a writ of inquiry after interlocutory judgment revived by *scire facias sur stat.* 8 & 9 W. III. c. 10, the final judgment must be against the administrator and not the intestate. *Weston v. James*, 1 Salk. 42.

If the probate be lost, the plaintiff may declare on an exemplification of it. *Shepherd v. Shorthose*, 1 Str. 412.

Executor *de son tort*.

An executor *de son tort*, is he who takes the intestate's goods before administration. *Anon.* 1 Salk. 313, but what acts make a person liable as executor *de son tort* is a question of law, the jury are to say whether the acts be sufficiently proved. *Padget v. Priest*, 2 T. R. 97. And the slightest circumstance of intermeddling with the intestate's goods, will constitute a man an executor *de son tort*. *Ib.* S. P. *Edwards v. Harben*, 2 T. R. 587.

So hostile is the law to interference in the effects of the intestate without authority, that it has been decided upon error in the Exchequer Chamber, that an executor *de son tort* cannot discharge himself from an action brought by a creditor, by delivering over the effects to a rightful executor after the action is brought. *Curtis v. Vernon*, 3 T. R. 587. Nor can he retain for his own debt of an higher nature, by consent of the rightful executor, given after the bringing of the action by the creditor. *Ib.*

Where executors, &c. are or are not answerable, and cases as to assets.

Executors and administrators are answerable as far as they have assets. *Bac. Abr. ub. sup.* 95; and the testator's covenant extends to them, though not expressly mentioned, *ib. n.*; but they are not bound to embark in the personal trusts of their testator, nor to answer for injuries committed by him. *Bac. Ab. ub. sup. for actio personalis moritur cum persona.*

But they are answerable where there is a duty as well as a wrong, that is in all personal actions which arise *ex contractu*, but not *ex maleficio*. *Ib.* 97. Trover lies not against executors for a conversion by their testator. *Hambly v. Trott*, 1 Comp. 375.

The touchstone of these cases is put by Lord Mansfield. Where the plea is that the testator is not guilty, the form of action will not lie against an executor. The above case was decided upon great consideration.

All sums stated by an executor in his inventory given into the Ecclesiastical Court, as supposed to be recoverable, are assets in his hands, unless he prove a demand and refusal. *Young v. Cawdrey and Another*, 8 Taunt. 734.

An executor may make himself liable to the plaintiff's demand, by submitting his testator's disputes to arbitration, and binding himself to perform the award. *Smale's Executors v. Waite, Willes, 317, n. a. See infra.*

This question of liability of executors to costs or not, has been made the subject of a great variety of decisions, and the learning, ingenuity, and authority of the ablest men have been employed to distinguish some certain principle, influencing those decisions, that have taken place upon stat. 23 H. VIII. c. 15. Though not as an excuse, the difficulty may certainly present a reason for stating only a few of the practical cases. An elaborate comment on the question will be found, 2 B. & P. 254, and reference may be had to the work on Costs by Mr. now Mr. Baron Hullock, and that of the Law of Executors and Administrators by Mr. Toller. Of their liability as to costs.

When the plaintiffs, and suing in *auter droit*, executors and administrators pay no costs. *Bac. Abr. ub. sup.* not even where judgment is as it may be obtained against them, as in the case of a nonsuit. *Howard v. Rathbone, Willes Rep. 316; per cur. M. 42 G. III. K. B. 2 Tidd, 993.* An executor is liable to costs of a non pros; if he wish to be relieved from costs, he should apply to the court for leave to discontinue without payment of costs. *Anon. 1 Chit. R. 629, n.* And also costs for not going to trial according to notice. *Ib.* On a latter day in the term, a question arose whether executors having held a party to bail, without reasonable or probable cause for a debt due to their testator, were within the stat. 43 G. III. c. 46. s. 1. And the court held that they were, because an action for a malicious arrest would lie against them, and this was an analogous remedy. *Freely v. Reed, 5 B. & A. 515, n. a.* So also where they bring an action in their own right, as for a conversion or a trespass in their own time, although they name themselves executors, they shall pay costs. *Howard v. Rathbone, Willes Rep. 316.*

In a late case also it was decided, that where administrators declare in *trover*, on a possession of the goods by their intestate and a conversion in their own time, and are nonsuited, they are liable to costs: for the fact of their possession was held immaterial, and that they might sue in their own right. *Hollis v. Smith, 10 East, 293.* And see *Monkhead v. De Grainge, M. 41 G. III. K. B. 2 Tidd, 992.* The case of *Cockrill v. Kynaston*, as to the costs was held to be over-ruled by that of *Bolland v. Spencer, 7 T. R. 358.*

Covenant by the plaintiff as administratrix on a breach subsequent to the death of her intestate, and judgment against her on demurrer; held that she was not liable to costs. *Tattersall v. Groote, 2 B. & P. 253.*

Where plaintiff sued as executor, and was nonsuited upon evidence being given at the trial, that the supposed testator was still alive, the court refused to allow costs to the defendant, it appearing from affidavits on both sides, to be still at least doubtful whether the supposed testator were living or not. *Zachariah v. Page, 1 B. & A. 386.*

EXECUTOR AND ADMINISTRATOR. EXIGENT.

Executors or administrators are not necessarily exempted from costs on interlocutory motions. *Per cur. M. 42 G. III. K. B. 2 Tidd*, 993.

Where a lessor of the plaintiff dies after the commission day at the assizes, and is nonsuited upon the merits of the ejectment, his executor is not liable for the costs under the common consent rule given by the testator in his life-time. *Doe, d. Payne v. Grundy*, 2 D. & R. 437. 1 B. & C. 284.

When defendants they shall both pay and receive costs where so judged, 2 B. & P. 253; and the judgment against them is *de bonis testatoris si, &c. & si non, tunc de bonis propriis*. *Ib.*

But upon the pleas of *non-assumpsit* and *plene administravit*, the plaintiff joined issue, and omitted to pray judgment of assets *quando*, &c. the first issue being found for the plaintiff, and the second for the defendant; the defendant is entitled to the *postea* and general costs. *Hogg v. Graham*, 4 Taunt. 135.

An administrator may make himself liable to costs, by applying to be made party to a rule of court in which costs are reserved. *Smale's Executors v. Waite*, Willes, 316, *n. a.*

Where an executrix pleaded, first, *non-assumpsit*, second, *ne unques executrix*, and, third, *plene administravit*, and issues on the first pleas were found for plaintiff, and on the last for defendant, it was holden that the last plea, being a complete answer to the action, the defendant was entitled to the general costs of the trial. *Edwards v. Bethel*, 1 B. & A. 254.

On a judgment of assets *quando acciderint*, upon a plea by an executor of a judgment outstanding, and *plene administravit*, the plaintiff is entitled to costs *de bonis testatoris*. 1 Chit. R. 629, *n.*

Where an executor or administrator pleads several pleas to the whole declaration, as *non-assumpsit* and *plene administravit*, and one of them is found for him, he is entitled to the *postea* and costs, though the other plea be found against him. *Garnans v. Hesketh*, E. 22 G. III. K. B. *Cockson v. Drinkwater*, T. 23 G. III. K. B. 2 Tidd, 994.

The statute 8 & 9 W. III. c. 11, does not extend to an action of *debt* on bond against executors, one of whom is acquitted on the plea of *plene administravit præter*. *Duke of Norfolk v. Anthony and Another*, E. 42 G. III. K. B. 2 Tidd, 1001.

EXHIBIT. Where a paper or other writing is on motion, or on other occasion proved; or if affidavit to which the paper-writing is annexed refer to it, it is usual to mark the same with a capital letter, and to add: "This paper-writing, marked with the letter A., was shewn to the deponent at the time of his being sworn before me, and is the same by him referred to by the affidavit annexed hereto." Such paper or other writing, with this attestation, signed by the judge or other person before whom the affidavit shall have been sworn, is called an *exhibit*.

EXIGENT. The writ of *exigi facias*, which, from its analogy with *feri facias*, *scire facias*, &c. may be treated under the next title.

EXIGI FACIAS. Writ of Exigi Facias.

What.

This is a writ issued in the course of proceeding to outlawry, deriving its title or application from the mandatory words to be found therein, signifying "that you cause to be exacted or required," and it is that proceeding in an outlawry which, with the writ of proclamation, issued at the same time, immediately precedes the writ of *capias utlagatum*.

See titles **CAPIAS UTLAGATUM. OUTLAWRY.**

PRACTICAL DIRECTIONS.

This, as well as the writ of proclamation to be mentioned hereafter, is made out by the filazer, on leaving with him the capias, alias and pluries capias, previously issued out in proceeding to outlaw a defendant, and returned by the sheriff. By whom issued.

The writ of exigi facias is usually directed to the sheriff of the county where the action is laid; but as to whether it must be so directed or not, the authorities are not agreed. That it must, see Bro. Abr. tit. Exigent and Capias, Dyer, 295. That it need not be so directed, see Gilb. C. P. 15. Crompt. introduction, 95. 5 Bac. Abr. 242. To whom directed.

As the filazer makes out the writ and proclamation, the forms might be omitted, but the proceeding itself will be the better understood by referring to the forms, and they are therefore subjoined; time is also saved by the attorney engrossing them. Pay filazer for writ and proclamation 16s. 6d. sealing 7d. each. These are to be taken to the proper sheriff's office (usually London, for the reason presently assigned), pay returning 2s. 8d. When the five exactions have been duly returned, the capias utlagatum may issue.

This writ of capias utlagatum is very fully treated under its proper title.

But it may so happen that five exactions are not returned, and that an allocatur exigi facias may be necessary; as, where there shall not be hustings courts, if in London, or county courts, if elsewhere, sufficient between the teste and return of the writ of exigi facias, to enable the sheriff to return five exactions and proclamations; if even upon the allocatur exigi facias, the full five exactions shall not be returned, another exigi facias and writ of proclamation must be issued; this is rarely, if ever, necessary. The allocatur is obtained on leaving the exigi facias, or first allocatur, as in the case above-mentioned, with the filazer, who, on first bespeaking the writ, as above directed, makes the same out. Pay for such allocatur and proclamation 11s. 6d. sealing 7d. To be left in like manner with the sheriff to be returned.

Of the writ of allocatur ex. fa.

It is necessary to be careful that no county court days, or hustings days intervene between the last of the former county court or hustings days returned, and the teste of the allocatur; for the exaction of the party must be at five court days immediately succeeding one another, and if this shall not have been the case, an allocatur will be had, and a new exigi facias must issue. This I take to be the sense of what is mentioned incidentally in the report of Stowel v. Lord Zouch, Plowd. 371.

Exaction necessary five successive court days.

It is remarked by Try's Jus Filaz. 67, that if the action be laid in London, the defendant will be the sooner outlawed in respect of the hustings than in any county; and page 66, that Hilary Term is not so convenient to begin to sue to the outlawry as in other terms on account of the short vacation between Easter and Trinity Terms.

Why proceeding in London preferable, and when to commence outlawry.

As the writ of exigi facias and the writ of proclamation co-operate in effecting one stage of the proceeding to outlawry, I have not disjoined them, but shall now more particularly treat the writ of proclamation, mentioned above.

Writ of proclamation.

When called
foreign procla-
mation.
Stats. 6 H. VIII.
c. 4. 31 Eliz. c. 3.

It is called a foreign proclamation when it is not directed to the same sheriff as the writ of exigi facias is.

Stat. 6 H. VIII. c. 4. first gave the writ of proclamation, but the present law and practice in relation to this writ originates with stat. 31 Eliz. c. 3. s. 1. By which in every action personal, wherein any writ of exigent shall be awarded out of any court, one writ of proclamation shall be awarded and made out of the same court, having day of teste and return, as the said writ of exigent shall have directed, and delivered of record to the sheriff of the county where the defendant at the time of the exigent so awarded, shall be dwelling, which writ of proclamation shall contain the effect of the same action, and that the sheriff of the county, and to whom any such writ of proclamation shall be directed, shall make three proclamations in this form following, and not otherwise, that is to say, one of the same proclamations in the open county court, and one other of the same proclamations to be made at the quarter sessions of the peace in those parts where the party defendant at the time of the exigent awarded, shall be dwelling, and one other of the same proclamations to be made one month at the least before the quinto exact by virtue of the said writ of exigent, at or near to the most usual door of the church or chapel of that town or parish where the defendant shall be dwelling at the time of the said exigent so awarded, and if the defendant shall be dwelling out of any parish then in such place as aforesaid, of the parish in the same county, and next adjoining to the place of the defendant's dwelling, and upon sending immediately after divine service and sermon, if any sermon there be, and if no sermon there be, then forthwith after divine service, and that all outlawries had and pronounced, and no writs of proclamation awarded and returned according to the form of this statute, shall be utterly void, and of none effect.

Its teste.

This writ bears the same teste and return with that of the writ of exigi facias or exigent.

FORMS.

No. 1.
Writ of *exigi fa-*
cias, or *exigent*.
K. B.

George, (&c.) To the sheriff of ———, greeting: We command you, that you cause ———, late of ——— (*exactness as to the place is indispensable. See stat. 1 H. V. c. 5.*) in your county, to be demanded from county court to county court, until, according to the law and custom of England he be outlawed if he doth not appear; and if he doth appear, then take him and keep him safely, so that you may have his body before us on ——— (*if there shall not, as probably there will not be, sufficient county or hustings court days between the teste and return, an allocatur exigi facias must issue*) wheresoever we shall then be in England, to answer to ———, of a plea for that whereas the said ———, on, (&c. *copy the whole precipe*) to the damage of the said ——— of £——, as it is said, and whereupon you did, on ——— (*the day of the sheriff's return to the pluries capias*) last past, make a return to us that the said ——— was not found in your bailiwick. And have you there this writ. Witness ———. (*The teste must be the quarto die post of the return of the pluries capias.*)

No. 2.
Return of the
late and present
sheriff to above
writ.

At my county court held for the county of ———, at the sign of ———, in the parish of ———, in the county aforesaid, on the ——— day of ———, in the year within written, the within named ——— was a first time demanded, and did not appear. And at my county court held for the said county of ———, at the sign of ——— aforesaid, the ——— day of ———, in the year aforesaid, the said ——— was a second time demanded, and did not

EXIGI FACIAS; FORMS.

713

appear. And at my county court held for the said county of _____, at the sign of _____ aforesaid, the _____ day of _____, in the year aforesaid, the said _____ was a third time demanded, and did not appear.

The answer of _____, sheriff.

(If the sheriff go out of office, the new sheriff makes the following return:)

The writ, as above indorsed, was delivered to me, the under-named present sheriff, by the above-named late sheriff, at his going out of his office.

(The new sheriff then proceeds.)

At my county court held for the said county of _____, at the sign of _____ aforesaid, the _____ day of _____, in the year aforesaid, the said _____ was a fourth time demanded, and did not appear. And at my county court held for the said county of _____, and at the sign of _____ aforesaid, the _____ day of _____, in the year aforesaid, the said _____ was a fifth time demanded, and did not appear.

Therefore by the judgment of _____, esq. and _____, esq. coroners for our sovereign lord the king, for the county aforesaid, the said _____ is outlawed.

The answer of _____, sheriff.

George, (&c.) To the sheriff of _____, greeting: We command you, that allowing those hustings at which _____, late of _____, was demanded, and did not appear, as you returned to us to our justices at Westminster, at a certain day now past, you cause the said _____ to be further demanded at your next hustings, until (&c. *here copy the exigi facias down to the words "it is said"*), and have there this writ. Witness, Sir William Draper Best, knt. at Westminster, the _____, (&c.)

No. 3.
Writ of *allocatur*
exigent, C. P.

N. B. *If in the county court, say "allowing those _____ county courts," and so putting "county court" for "husting:" the teste of this allocatur should be the quarto die post of the return of exigi facias if out of term; if in term, the return of the exigi facias. In the copying the exigi facias, as above directed, the return must be altered so as to embrace, if possible, the remaining number of hustings or county court days, in order to complete the outlawry.*

George, (&c.) To the sheriff of _____, greeting: Whereas by our writ, we have lately commanded you that you cause _____, late of _____, in your county, to be demanded from county court to county court, until, according to the law and custom of England, he be outlawed, if he shall not appear, and if he should appear, then that you should take him and keep him safe, so that you might have his body before us on _____, (*the return of the exigi facias*) wheresoever we should then be in England, to answer to _____, of a certain plea of trespass on the case to the damage of the said _____, of £____, as it is said. We therefore command you that, according to the statute in that case made and provided in the thirty-first year of the reign of Elizabeth, late queen of England, you cause the said _____ to be proclaimed three several days, according to the form of the said statute, one of which proclamations to be made at or near the most usual church door of the parish where the said _____ is, an inhabitant, that he render himself to you, so that you may

No. 4.
Writ of *proclamation*.

EXONERETUR; PR. DI. K. B.; C. P. EXPENCES.

have his body before us at the aforesaid time, to answer the said _____ in the plea aforesaid, and have there this writ: Witness, _____.

No. 5.
The return of the writ of proclamation.

By virtue of the within writ to me directed, I caused the within named _____, to be proclaimed three several days, according to the effect of the within mentioned statute, as it is within commanded me.

The answer of _____, sheriff.

EXONERETUR. See titles BAIL; *Surrender in discharge of Bail*. BANKRUPTCY. COMMITTITUR PIECE, *ante*.

What.

An *exoneretur* derives its appellation from the operative word, whereby the master or filazer, at the instance of bail, on previous notice or order for that purpose, cancels their liability on the bail piece to the plaintiff for the debt of their principal due to him.

The defendant was arrested by a wrong Christian name, but the plaintiff having declared against him, and bail having been put in and perfected for him by his right name, the bail cannot afterwards object to the irregularity, upon a motion to enter an *exoneretur* upon the bail piece. *Clarke v. Baker*, 13 *East*, 273.

So, after justification and subsequent demand of plea, and time allowed for pleading, it is too late to object a variance of action stated in declaration, from that stated in the affidavit to hold to bail. *Knight v. Dorsy*, 1 *B. & B.* 48.

So where one of the king's guard had been arrested in the palace court, and by *habeas corpus cum causa* removed the case into this court, and had put in and perfected bail upon the *habeas corpus*: Held, that the bail had not been exonerated, even supposing the defendant privileged from arrest. *Sard v. Forrest*, 2 *D. & R.* 250. 1 *B. & C.* 139. *S. C.*

As to where the court of C. P. will direct an *exoneretur* to be entered in case of a defendant in criminal custody, see page 253, *ante*. And see *Littlewood v. Crowther*, 3 *D. & R.* 533.

PRACTICAL DIRECTIONS, K. B.

Obtain bail piece from the judge's chambers; also certificate from the proper officer in whose custody the prisoner may be: take these, together with the rule or order for the exoneretur, to the master, who enters the exoneretur on the bail piece. This being done, file same with the signer of the writs. If filed without an exoneretur entered thereon, the bail remains liable. The rule or order will have been obtained on motion or summons, as mentioned under the titles to which reference is above made.

PRACTICAL DIRECTIONS, C. P.

The exoneretur is entered by the filazer in his day book, on the production of the like documents.

EXPENCES. *Expences of Arbitration*. See title ARBITRATION, *ante*.

_____. *Expences of Executions*. See title EXECUTION, *ante*.

_____. *Expences of Witnesses*. See titles SUBPENA, WITNESS.

EXTENT. *Writ of extent.*

Extent, or extent in chief, as at present used, is an execution at the suit of the crown; and being a mere fiscal writ, it is scarcely a title of general practice; but as it may often interfere with an execution by *fiery facias* at the suit of the subject, such cases as may also relate to extent in chief will be found by referring to titles EXECUTION, *ante*; and FIERY FACIAS.

This writ of extent in chief issues out of the Exchequer, and the practice belonging exclusively to the clerks and attornies of that court, to dilate upon the practice here seems useless.

But although this extent be issued in cases where the crown is party, yet extent, as a general term, is not peculiar to crown practice, *e. g.* the execution which issues by virtue of a statute merchant or statute staple, is called an extent; so also in that execution which issues against an heir, on a judgment in an action of debt against him, on the obligation of his ancestor.

And EXTENT IN AID, also an Exchequer process, formerly much and now somewhat liable to be abused, is regulated by stat. 57 G. III. c. 117. For the doctrine and practice in relation to extent, as an Exchequer process, whether in chief or in aid, see *West on Extents*. Also 2 *Tidd*, Index.

The above statute has very much obviated a gross abuse of this writ. For not only any person indebted, or likely to be indebted to the crown on specialty or record, but any one so indebted in part or by simple contract only, might have extent in aid issued in their favor. The effect of this supposed right often became very injurious, not only to the debtor to the crown, but to the customers and connexions of such debtor; and who, in consequence of the issuing of the writ, suddenly found themselves called upon to pay the amount of their respective debts into the Exchequer.

To remedy this, a growing mean of oppression, the above mentioned statute was passed; and thereby "it shall not be lawful for any person, companies or societies of persons, corporate or not corporate, who shall or may be indebted to his majesty by simple contract only; nor for any such person, companies or societies, who shall or may be indebted to his majesty by bond, for answering, accounting for, and paying any particular duty or duties, or sum or sums of money, which shall arise or become due and payable to his majesty from such person, companies or societies respectively, for and in respect and in the course of his or their particular trades, manufactories, professions, businesses or callings; nor for any sub-distributor of stamps, who shall have given bond to his majesty; nor for any person who shall have given bond to his majesty, either jointly or separately, as a surety only for some other debtor to his majesty, until such surety shall have made proof of a demand having been made upon him on behalf of his majesty, in consequence of the non-performance of the conditions of the bond by the principal, and then only to the amount of the said demand; to sue out and prosecute any extent in aid, by reason or on account of any such debt or debts to his majesty respectively, for the recovery of any debt or debts due to such person, companies or societies, or to such sub-distributor of stamps or

Stat. 57 G. III.
c. 117. s. 4.

Stat. 57 G. III.
c. 117.

surety as aforesaid: and that all and every commission to find debts, extent in aid, and other proceedings, which shall be so issued or instituted at the instance of or for such simple contract or bond debtor or debtors respectively, and all proceedings thereupon, shall be null and void. The act not to extend to prevent any persons who shall or may become debtor or debtors to his majesty by simple contract only, by the collection or receipt of any money arising from his majesty's revenue, for his majesty's use, from applying for and suing out any commission or commissions, extent or extents in aid, in case one or more of such persons shall be bound to his majesty, by bond or specialty of record in the said court of Exchequer, for answering, securing, paying over, or accounting for to his majesty, the particular duties or sums of money, which shall constitute the debt that may be so then due from such person or persons to his majesty.

Sect. 5.

"No extent in aid shall be issued on any bond given by any person as a surety for the paying or accounting for any duties which may become due to his majesty, from any body or society, whether incorporated or otherwise, carrying on the business of insurance against any risques, either of fire or of any other kind whatever."

Sect. 6.

Also, by the same statute s. 6. "any person, imprisoned under or by virtue of any writ of *capias*, on any extent in aid, to apply to the barons of his majesty's court of Exchequer in England or Scotland, or to any baron of the same court in vacation, for his discharge, giving one month's previous notice in writing to the person to whom he owed the debt or sum or sums of money for which he is so imprisoned, at the time such debt was seized under such extent in aid, of his intention to make such application, and stating in such notice the ground of such application, and an enumeration and description of all and every the property, debts and effects whatsoever, of such person, in his own possession or power, or in the possession or power of any other person, for his use; and the said court, or any such baron in vacation, to whom such application shall be made, is authorised to order such person to be brought before them or him, to be examined upon oath, touching and concerning his property and effects; and if such person shall, upon such examination, make a full disclosure of all his property and effects, to the satisfaction of the said court or baron, or it shall otherwise appear reasonable and proper to such court or baron that such person should be no longer imprisoned under such writ, such court or baron may order a writ of *superseas quoad corpus* to be issued out of the said court, for the liberation of such person from such imprisonment. No such liberation as aforesaid shall be held or deemed to satisfy or supersede such extent in aid, or any proceedings thereon, except as to such imprisonment, or the debt or debts seized under and by virtue thereof, and for which such person or persons shall be so imprisoned."

Sect. 1.

"Upon the issuing of every extent in aid, on behalf of any debtor to his majesty, his majesty's court of Exchequer at Westminster, or the chancellor of his majesty's Exchequer, or lord chief baron or other baron of the said court, granting the *fiat* for the issuing of such

extent in aid, shall cause the amount of the debt or sum of money due or claimed to be due to his majesty, to be stated and specified in the said *fiat*; and that in all cases in which the debt or debts found due to the debtor to his majesty shall be equal to or exceed the debt stated and specified in the said *fiat* as aforesaid, the amount of the debt so stated and specified in the said *fiat* shall be indorsed upon the writ; and the writ so indorsed shall be deemed to be, and be the authority and direction to the sheriff or other officer who shall execute such writ, in making his levy and executing the same, as to the amount to be levied and taken under the said writ: and that in all cases in which the debt or debts found due to the debtor to his majesty, shall be of less amount than the debt stated and specified in the said *fiat* as aforesaid, the amount of such debt or debts found due to such debtor to his majesty shall be indorsed upon the writ; and the writ so indorsed shall be deemed to be, and be the authority and direction to the sheriff or other officer who shall execute the said writ, in making his levy and executing the same, as to the amount to be levied and taken under the said writ: and that the money levied, taken, recovered, or received under or by virtue of every such extent in aid so prosecuted and issued, shall be, by order of the said court, paid over to and for his majesty's use, towards satisfaction of the debt so due to his majesty as aforesaid.

Stat. 37 G. III.
c. 117.

"In every case in which the sum produced by the sale of any lands, goods or chattels taken, or by the receipt of any sum of money, by any sheriff or other officer, under any such writ of extent, for the purpose of levying the amount or sum of money indorsed upon the back of the writ, shall be more than sufficient to satisfy the amount of the sum so indorsed upon the writ, such overplus shall be paid into the court of Exchequer, together with the said amount indorsed upon the said writ; and the said court shall, upon any summary application or applications, make such order, for the return, disposal, or distribution of any such surplus, or any part or proportion thereof, as to the said court shall appear to be proper."

Sect. 2.

The *elegit* issues against the lands of the ancestor in possession of the heir, on a judgment obtained against such ancestor, and revived by *scire facias* against the heir and terre-tenants, and in that case the execution by *elegit* issues against the lands in possession of the heir, as if the heir were tenant thereof. See titles ELEGIT. SCIRE FACIAS.

Where *elegit* and
where extent
issues.

But as the judgment against the heir may be special, as upon bond, where the ancestor has bound the heir, so is the execution; and in this case a writ issues in the nature of an extent, which directs a levy to be made on all the lands descended; whereas the *elegit*, as before observed, only touches a moiety of the heir's lands. See 2 Saund. 7, n. 4.

If therefore it shall be judged expedient to issue execution against the heir, a form of an extent, by which the whole lands descended may be taken in execution, is subjoined.

For the Practical Directions, see title ELEGIT.

FORMS.*

No. 1.
An extent on special judgment against an heir, at suit of executor. See Off. Brev. 83.

George, (&c.) To the sheriff of ———, greeting: Whereas ———, executor of the last will and testament of ———, deceased, lately in our court before us, recovered against ———, son and heir of ———, his late father, deceased, as well a certain debt of £——, as also £—— for his damages, which he had sustained by reason of the detention of that debt *, of the lands and tenements which were of the said ———, in fee-simple, at the time of his death, in the hands of the said ———, to be levied, and whereof the said ——— (*the heir*) is convicted, *as appears to us of record*. Therefore* we command you, that by the oath of honest and lawful men of your bailiwick, you diligently inquire of what lands and tenements the said ——— (*the ancestor*) was possessed, in fee-simple, at the time of his death, and which, after the death of the said ——— (*the ancestor*) descended to the said ——— (*the heir*) his son and heir by hereditary right, and of which the said ———, the son, on the ——— day of ———, in the ——— year of our reign, the day of issuing the writ of the said ——— against the said ———, for the debt aforesaid, was seised in his demesne as of fee. And how much the said lands and tenements, with the appurtenances, are worth by the year, according to the true value of them, beyond all issues and reprises. And such inquisition being so made by you without delay, deliver the same lands and tenements, with their appurtenances, to the said ——— (*the executor*) to hold to the said ———, and his assigns, as his freehold, and until the debt and damages aforesaid be thence levied. And in what manner you shall have executed this our writ make appear to our justices at Westminster, in ———, under your seal, and the seals of them by the oath of whom you shall make extent and appraisement aforesaid. And have there the names of them by the oath of whom that extent and appraisement shall be taken and this writ. Witness, ———, at Westminster, the ——— day of ———, in the ——— year of our reign.

No. 2.
When judgment against the heir is general.

George, (&c.) (*As in the last, down to the first asterisk, then leave out the words between the asterisks, and insert the following clause in lieu thereof, and having so done, go on from the last asterisk in such precedent;*) whereof the said ——— is convicted, as appears to us of record. And afterwards the said ——— came into our said court, and demanded all the lands and tenements of the said ———, (*the son*) in your county, which to the said ———, (*the son*) descended from the said ———, (*the father*) his father, (*as the case may be*) in fee-simple, and of which the said ———, (*the son*) on the ——— day of ———, in the ——— year of our reign, on which day the said ——— sued out his original writ against the said ———, for the said debt, was seised, but because it is unknown what lands and tenements the said ———, on the said day of suing out his said original writ, had by hereditary descent from the aforesaid ———, his father. (*Therefore, &c. as above, from the second asterisk.*)

* The forms in relation to extent in aid being Exchequer process, and only issuable by the clerks and attorneys of

that court, it does not fall within the scope of this Dictionary to insert them.

EXTORTION. And see titles **ARREST.** **BAILIFF,** *ante.*

An unlawfully taking by an officer by colour of his office, of What. any thing that is not due, or more than is due, or before it is due. *Co. Litt.* 368. *b.*

By stat. 32 G. II. c. 28. s. 11. for the more speedy punishing Stat. 32 G. II. gaolers, bailiffs, and others, employed in the execution of process, c. 28. s. 11. for extortion, or other abuses in their respective offices and places, upon the petition, in term time, of any prisoner or person being or having been under arrest, or in custody, complaining of any exaction or extortion by any gaoler, bailiff, or other officer or person, in or employed in the keeping or taking care of any gaol or prison, or other place where any such prisoner or person under, or having been under, arrest or in custody, by any process or action, is or shall have been carried, or in respect of the arresting or apprehending any person, by virtue of any process, action, or warrant, or of any other abuse whatsoever, committed or done in their respective offices or places, unto any of his majesty's courts of record at Westminster, from whence the process issued, by which any person who shall so petition was arrested, or under whose power or jurisdiction any such gaol, prison, or place is; or in vacation time, to any judge of any such courts at Westminster, from whence any process so issued, or to the judges of assize, or justices of great sessions in their respective circuits, or to the judge or judges of any other court of record, where any prisoner or person being or having been under arrest, or in custody, was arrested or in custody by process issued out of, or action entered in, any such other court of record in England; and if within the principality of Wales, or county palatine of Chester, then to the justices of some great sessions, to be holden for the county in the principality of Wales, or for the county palatine of Chester, where any such prisoner or person being or having under arrest or in custody, was arrested or in custody in the said principality of Wales or county palatine of Chester, every such court, judges of assize, and justices of great sessions, and judge and judges of all inferior courts of record, are thereby authorized and required, respectively within their several jurisdictions, to hear and determine the same in a summary way, to make such order thereupon, for redressing the abuses which shall by any such petition be complained of, and for punishing such officer or person complained against, and for making reparation to the party injured, as they shall think just, together with the full costs of every such complaint, and all orders and determinations which shall be thereupon made by any of the said courts, or any of the said judges, justices of assize, justices of great sessions, judge or judges of any such inferior court as aforesaid, respectively, in such summary way as is therein prescribed, shall have the same effect, force, and virtue, and obedience thereunto may be enforced by the respective courts, judges, justices of assize, justices of great sessions, judge or judges of any such inferior court, by attachment, or in any other manner, as other orders of the said respective courts, judges, justices of assize and great session, judge or judges of inferior courts of record, may be enforced.

EXTORTION; STATUTE. EXTRA COSTS.

By sect. 12, no gaoler or keeper of any gaol or prison, or other person thereto belonging, shall demand, take, or receive, directly or indirectly, of any prisoner for debt, damages, costs, or contempt, any other or greater fee or fees whatsoever, for his commitment or coming into gaol, chamber rent there, release or discharge, than what shall be mentioned or allowed in the list or table of fees, which is or shall be settled, inrolled, and registered, agreeably to that act, and that any sheriff, under-sheriff, bailiff of any liberty, bailiff, serjeant at mace, gaoler, and other officer and person as aforesaid, who shall in any wise offend against the said act, shall for every such offence against the same, (over and above such penalties or punishments as he or they shall be liable unto by the laws then in force), forfeit and pay to the party thereby aggrieved, the sum of fifty pounds, to be recovered with treble costs of suit, by action of debt, bill, plaint, or information, in any of his majesty's courts of record at Westminster, wherein no essoign, protection, or wager of law, or more than one imparlance, shall be allowed.

If it appear, by the sheriff's return to a writ of execution, that greater fees have been taken for the levy than are allowed by stat. 29 *Eliz. c. 4*, the sheriff is liable to an action on the statute for treble damages, at the suit of the party grieved. Under that statute the sheriff cannot take for any other charge, except for poundage. *Woodgate v. Knatchbull*, 2 *T. R.* 148.

If by abuse of the process of one of the courts at Westminster, a sheriff's officer extort a promissory note from the suitor, and then declare upon that note in another of the courts at Westminster, the latter court cannot interfere summarily to punish the officer under the above act (32 *G. II. c. 28. s. 11.*) *Ex parte Evans*, 2 *B. & P.* 88. It seems in this action, that the original process issued out of the court of Exchequer.

See title OPPRESSION.

EXTRA COSTS. See title COSTS, *ante*, page.384.

In practical language, these mean those costs which are over and above what are allowed on taxation between party and party, and which, on due proof of their reasonableness, the attorney may recover of his client.

It frequently happens, that fees to counsel, expences of, and paid to witnesses, and other charges and disbursements are greater than are allowed on taxation between party and party; others are not allowed at all; and where occasion for these payments and charges arises at the instance of the client, the attorney should be careful to obtain a proper authority for paying and making them.

END OF VOLUME I.

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